THE

MONTHLY LAW REPORTER.

JUNE, 1851.

THE IRISH BENCH AND BAR.[1]

The deserved success which has met the various editions of this publication by Mr. Phillips, has induced him to prepare the present or fourth edition. The original work appeared in 1825. Then merely a sketch — it has been so altered and enlarged in the various editions as to be made a new work. In the previous editions, sketches were given of Avonmore, Clonmel, Norbury, Fitzgibbon, Fitzgerald, Flood, Barrington, Burrowes, Dean Kirwan, Emmett, A. H. Rowan, T. W. Tone, and, neither last nor least, of "Old Bob Lyons" the attorney. The most remarkable additions to this edition are the sketches of Grattan, Plunket, Bushe, O'Connell, and the Duke of Wellington, whom the author's national spirit, and natural affection for his country, claim as an Irishman. The work has just been reprinted in this country by Harper and Brothers, of New York, in a neat volume of 450 pages. The Law Review for May, has an excellent notice of this interesting biographical work, of which we make free use in this article. The life of Curran is so well known, that we may leave it, and look only to the work which Mr. Phillips has accomplished.

In the peculiar plan of the book, Curran is made the centre, around which are gathered all the great lawyers and statesmen of his day; and hence there is before us, not merely the man but his age. There are also numberless

[1] Curran and his Contemporaries. By C. Phillips, Esq. Blackwood & Son. Second edition, 1851.

anecdotes and much dialogue recorded, either by an eye or ear witness, or by one who, from eye and ear witnesses known to himself, obtained the particulars. There runs through the whole work such a just appreciation, both of the relative importance of topics, the relative value of men and the relative value of testimony, such undeviating candor and manifest impartiality, as give entire confidence in the author and an enduring interest to his narrative.

The work opens to us an age gone by, and depicts the names and habits of a strange people. The destitution of the present generation in Ireland is not to be wondered at, when one reads of the reckless improvidence and systematic prodigality of their forefathers in all ranks of society. The so-called amusements of racing, drinking, and above all, duelling, entirely occupied their minds and constituted the chief staple of their social enjoyment. The latter science, indeed, barristers, heads of colleges, embryo chancellors and chief justices, masters in chancery, attorneys and attorney-generals, seem to have made a study preparatory to their respective professions. Curran himself fought four duels, and Norbury, when on the Bench, often gave no very obscure intimations that he was ready for the field when disencumbered of his robes. Even MacNally, Curran's junior in most of the state trials arising out of the rebellion, and afterwards the butt of the youngsters of the bar, when Grady, who wounded every body with whom he fought, refused that favor to him, was the picture of misery, "until Sir Jonah Barrington, out of Christian charity, accepted his cartel and shot him into fashion."

The plan of Mr. Phillips's book is original and bold. The characters are not only given at full length, but they are drawn in the presence of a generation, many of whom had a personal knowledge of the originals. They are graphically drawn and verify themselves. The whole book is full of these delineations of the most remarkable men of the age in Ireland. The course pursued is this. The personal appearance of the subject of the sketch is hit off with great minuteness, and his career, whether political, parliamentary or professional, is then given, the whole being interspersed with characteristic anecdotes and witticisms. While this amuses, it at the same time is often suggestive of serious reflection. The specimens of eloquence are necessarily brief, but are sufficient for the purpose, and a perusal of them will give a more correct estimate of

the parliamentary and professional eloquence of the nation. The invectives of Grattan stand almost alone in the language, and we know of nothing superior to his portraiture of Lord Chatham. The career of Curran is, of course, the chain by which the other characters are linked together, and, as might be expected, he is from first to last prominent on the scene. His wit, his alternate drollery and dejection, the style of his conversation, and the peculiar charms of his companionship are all given with manifest fidelity. The wonderful exhibitions of this great orator's eloquence, are, however, the gems of the work. The extracts from his speeches are copious, and comprise their finest passages.

The Legislative Union was carried while these men were on the stage and in the vigor of their strength. Their description of the means by which it was effected, is given "with indignant eloquence and frightful fidelity." "The peerage was sold, the caitiffs of corruption were every where, in the lobby, in the streets, on the steps, and at the door of every parliamentary leader, whose thresholds were worn by the members of the then administration, — offering titles to some, amnesty to others, and corruption to all."

But extracts from some of the sketches themselves, will give the best idea of the book and of the men. Where all are good, the difficulty is not what to select, but what to omit.

BUSHE.

"Observe, on the steps of the Court of Chancery, that Mirabeau-formed figure, gazing abstractedly upon the crowd below. Mirabeau, indeed, in shape and genius, without the alloy of his vices or his crimes. What sweetness there is in his smile! what thought upon his brow! what pure benevolence in the beaming of his blue unclouded eye! Observe him well; he will repay the study. Had that man been born in England, with a theatre worthy of his powers, and an audience capable of appreciating them, he must have commanded a European reputation. That is Bushe — Charles Kendal Bushe — the future chief justice of Ireland, with powers worthy of a world's admiration, and a name 'cribbed and cabined' within a province. By nature enriched with the rare gift of genius, he ingrafts it on every grace that art can furnish. The sweet-toned tongue lavishing profusely the treasures of language, intellect, and learning, speaks not more expressively to heart or head than the glance, the action, and the attitude which wait upon his words, as it were, with an embodied eloquence. This is the day of Kemble and of Siddons, yet the stage possesses no more consummate actor. Consummate truly, for not one trace of art betrays the toil by which it has been fashioned into Nature's image. A wit as well as an orator, Bushe is the delight of every social circle; and a model of

domestic virtue, he is the idol of his own. There is a peculiarity about him which renders description difficult. His wit, like his eloquence, seems to flow from him without effort. He is all smoothness. He wants the lines, as sculptors call them, by which a resemblance, becoming deepened, is defined. Duly to appreciate, you must see and hear him. One half his effect is lost either in description or perusal, and hence his posthumous fame must be inadequate

"The wit of Bushe has not a tinge of ill nature, and springs directly and naturally from the occasion. A few specimens may convey a feeble, and, when robbed of his manner, but a feeble idea of its character. A company of amateurs, persons of rank and fortune, established a private theatre in Kilkenny, where the performances rivalled even those of the metropolis. The local influence of the performers filled Kilkenny with visitors during the season, which, for the time, was gay, prosperous, and fashionable. Bushe, during a visit in the neighborhood, regularly attended the theatre, and, being intimate with the company, they requested his opinion as to their respective merits. 'My good friends,' said he, 'comparisons at best are but invidious. Besides, how can I give a preference where all are perfect?' Nothing, however, would satisfy them. 'We are unanimous,' they replied; 'all jealousy is out of the question, and your opinion we must have.' 'Well, well,' gravely replied Bushe, 'I give it most reluctantly. I protest to you I prefer the PROMPTER, for I heard the most and saw the least of him.' Those who knew Bushe well will smile at the familiar dexterity with which he evaded the question."

"A relative of Bushe's, not remarkable for his Hindoo ablutions, once applied to him for a remedy for a sore throat. 'Why,' said Bushe, gravely, 'fill a pail with water, as warm as you can bear it, till it reaches up to your knees; then take a pint of oatmeal, and scrub your legs with it for a quarter of an hour.' 'Why, hang it! man,' interrupted the other, 'this is nothing more than *washing one's feet*.' 'Certainly, my dear John,' said he, 'I do admit it is open *to that objection*.'

"There is an impromptu of his upon two political agitators of the day who had declined an appeal to arms, one on account of his wife, the other from the affection in which he held his daughter:

> 'Two heroes of Erin, abhorrent of slaughter,
> Improved on the Hebrew command —
> One honored his wife and the other his daughter,
> That "their days might be long in the land."'

"Dining one day with a right trusty Orangeman and 'something more,' the charter toast, as a matter of course, was given. Bushe seemed to hang fire. The Duke of Richmond, one of the guests, vociferated, 'Come, come, Mr. Solicitor, do justice for once to the "immortal memory."' Hours passed on, and the master of the revels did it such ample and such repeated justice, that at last he tumbled from his chair. The duke immediately raised and re-installed him. 'Well, my lord duke,' said Bushe, 'this is indeed retribution. Attached to the Catholics you may declare me to be — but, at all events, I never assisted at the *elevation of the Host*.'

"In Bushe's eloquence, as in his wit, there is no effort visible — no straining after effect. And yet the effect is produced. The language, the look, the action wonderfully harmonize. The words, which flow from his lips so smoothly and so sweetly, tell not more surely on his audience than does the gesture which accompanies them. The passions invoked by the incantations of his tongue seem to dwell for the moment on his countenance. There never, perhaps, lived a more splendid illustration of the mighty Greek's eulogy on action. Every attitude is grace; every pause, expres-

sion; every play of the features a visible portraiture of the thoughts uttered, and the sincerity which seems to inspire them. While Bushe enchains you by the magic of his diction, he also so enchants you by the charm of his manner, that ear, and eye, and understanding own the spell together. Bushe sustained on the bench his fame as an orator, but he was no longer the advocate. Between high and low, rich and poor, friend and enemy, he made no distinction, seeing in each and all only his fellow-man invoking justice; and, without favor, or affection, or hostility, justice he administered."

BURROWES.

"Prominent in the crowd stands Peter Burrowes, the friend of Grattan, of Plunket, of Tone, and to the last, and devotedly, of the exiled Emmett. He was a most singular personage, uniting to an intellect the most profound the most childlike simplicity. Though walking on the earth, he seldom saw or heard any thing around him. As he rolled his portly figure through the streets, his hands in his breeches pockets, and his eyes glaring on his oldest friend as if he had never seen him, it was plain to all men that Peter was in the moon. It is recorded of him, that, on circuit, a brother barrister found him at breakfast-time standing by the fire with an egg in his hand and his watch in the saucepan! This absence of mind was invincible, and sometimes produced the most ludicrous effects. I was present once when, in a case of *crim. con.*, intending to cast ridicule or something worse upon the opposing counsel, he thus broke forth, with his most unmusical voice and gasping enunciation: 'But, gentlemen, did you observe the glowing description my young friend gave of the lady? With what gusto he dwelt upon each charm! May heaven forgive me, but strange thoughts forced themselves uppermost! The couplet of the poet flashed on me as he proceeded —

'"He best can paint a star
Who first has dipped his pencil in —"'

His breath here caught, and he came to a dead stop: a roar from the bar broke upon his silence, when the unconscious Peter, looking as if but just awake, brayed out to his junior, 'In the name of Providence, what are they all laughing at?' and he gave, as was his custom, a very elongated grunt. The odd stop, the vacant stare, the somewhat terrified interrogatory, produced an effect that baffles all description. Let it not be supposed that, in relating these harmless peculiarities, I would have it understood that this man had not qualities vastly overbalancing them. It would be doing a double injustice to him and to myself Devoid of every grace and every art, ungainly in figure, awkward in action, and discordant in voice, no man more riveted the attention of an audience or more repaid it. His mind was of the very highest order: his manner forced the conviction of his sincerity, and his arguments were clothed in language chaste and vigorous.

"His grandest exploit, however, in this line, came off on one of the assize towns on his circuit. A murder, which caused much excitement, had been committed, and he had to state the case for the prosecution In one hand — having a heavy cold — he held a box of lozenges, and in the other the small pistol bullet by which the man met his death Ever and anon, between the pauses in his address, he kept supplying himself with a lozenge, until at last, in the very middle of a sentence, his bosom heaving and his eyes starting, a perfect picture of horror, Peter bellowed out, 'Oh — h — h — gentlemen — by the heaven above me — *I've swallowed the bull — llet.*' It is attempted by the orthography to give a faint idea

of the pronunciation; as to the manner, neither pen nor pencil could convey it.

"It is gratifying to record, that, through Lord Plunket's friendship, the last days of Burrowes were those of ease and contentment. About six years ago he died in London, at the age of ninety, in the enjoyment of sixteen hundred a year, that being the retiring allowance of an insolvent commissioner in Ireland."

ALLEN.

"Allen was a person *sui generis* — a phenomenon, a lawyer 'without guile;' simple, learned, abstracted; though in the world, he was scarcely of it. Foiled in four attempts to gain a fellowship in Dublin University, there can be no doubt that he was somewhat crazed by the continued application. For an examination, comprising all the sciences and all the classics, carried on in Latin, the preparation is necessarily painful and laborious. Thus soured in the outset of life, he contracted peculiarities with which it was not at any time oversafe to tamper. An insolent attorney once wofully rued the experiment in the hall of the Four Courts, Allen dashing his bar-wig in his face, very nearly blinding him with the powder! They met, as a matter of course. The attorney fired and missed; Allen, who had purposely reserved his fire, brandishing his pistol furiously about to the imminent danger of all within its range, wildly demanded of his awe-struck second, in whose mind's eye the gallows largely loomed, 'Shall I rush on him with a shout, *after the manner of the ancients?*'

"Many still surviving recollect the memorable 'appeal of murder,' Allen being for the appellant, MacNally for the respondent, and Downes presiding. What a scene it was! The solemn and ponderous old chief almost justified Curran's soubriquet of the 'Human quagmire,' so awfully did he shake. Perplexed, and somewhat terrified, he addressed himself to Allen: 'Have you any precedent, sir — any authority to cite to us for this most extraordinary proceeding?' 'I have, my lord,' said Allen, whose enunciation was slow, measured, and solemn, and whose bearing at the moment by no means invited familiarity; 'I have the authority of the most august court on record — that of the Athenian Areopagus.' 'And I,' squeaked out MacNally, 'meet it with the authority of the immortal Shakspeare — your lordship must remember the cut-throat invitation to poor Barnardine: "Barnardine, come out and be hanged." "Not I," quoth Barnardine; "it's *not convenient*."' Allen, however, despite the Areopagus, produced many and opposite authorities, and drew largely from the most recondite sources. Long and sorely did this chafe MacNally, upon whom the barbarous Latin and the Norman French might, without risk of detection, have been palmed for Hebrew. Much did he silently endure, rather than expose his deficiency; but, at last, page after page of gibberish set him almost beside himself. 'In the name of justice, I ask it, is a living man to be sacrificed to the dead languages? Give us plain English. I demand, at least, the benefit of the *vernacular*.' The arguments proceeded. The advocates waxed warmer, and Downes shook most awfully: it was little wonder. From the authorities cited, there appeared every probability that the battle must be fought; and there was Downes, grown gray upon the bench, the very model of ermined proprieties — the 'Virgin Judge,' as he was called, about to become, in his old age, a kind of judicial bottle-holder! 'Can it be possible,' he piteously exclaimed, 'that this "wager of battle" is seriously insisted on? Am I to understand this monstrous proposition as being propounded by the bar? that we, the judges of the Court of King's Bench — the recognized conservators of the

public peace, are to become not merely the spectators, but the abettors of a mortal combat? Is this what you require of us!' 'Beyond all doubt,' said Allen; 'and from the ancient books, the manner of it is thus: Your lordship is to be elevated on a lofty bench, with the open air above you, the public before you, and a spacious platform beneath you, on which the combatants are to do battle till one or both of them dies.' 'Ay,' again shrilly squeaked MacNally, 'from daylight to dusk, until your lordship calls out to us, "I see a star" — such is the consequence of Mr. Allen's proceedings!' As good luck, however, would have it, at this critical moment the case of Abraham Thornton turned up in England, quite as much to the horror of Lord Ellenborough as to the relief of Downes."

O'CONNELL.

"With this subject is inseparably connected the name of O'Connell, the great modern apostle of repeal. I knew him well, long, and intimately. He was the *beau ideal* of an Irish agitator. His every movement was 'racy of the soil.' Face, figure, accent, gait, and, above all, the rollicking, self-assured independence of his manner, were all so many proclamations of his country. As the leader of a multitude, especially of an Irish multitude, he never had a rival For this, there was in him a union of qualifications rarely found in any individual He identified himself with the national peculiarities; he stood sponsor for the perfection of the Irish peasantry, fed their hopes, flattered their foibles, blarneyed their pretensions; and every word he dropped, *mannaed*, as it was, in their own sweet idiom, went directly to their hearts. He dubbed them 'the finest peasantry' under the sun; and, poor people, they implicitly believed him! How could they do otherwise? There he stood — bland and burly, sincerity itself — a real son of the sod — speaking their own tongue — kindred in tastes, in habits, and by birth — and, dearer than all, a Roman like themselves! What more could a mortal Irishman desire? Indeed, in his creed lay very much of the secret of his sway. It secured for him a sympathy, a confidence, and an ascendency utterly unattainable by any Protestant. In Ireland, and in most countries of Catholicism, the dark ignorance of the lower classes renders them the helpless puppets of their clergy. The shrewd agitator was awake to this, and moulded it to his purpose. In the observance of the fasts, injunctions, and ceremonials of his Church, he was an obedient son; in all respect, and even submissiveness to its pastors, he was a pattern for the people. If from mute creation he named his 'own green land' a 'flower' and 'a gem,' he borrowed from vocal nature the emblems of his bishops; ornithology lent him 'the sweet dove of Elphin,' and the forest's contribution was 'a lion of the fold of Judah.' Nor were the prelates without their grateful nomenclature; and lo! on their lips Daniel became Moses. These are no fictions: yet how strange the fact! Happy prelates! happier patriot!

"In all this, however, the policy of O'Connell was profound: it was Jesuit perfection When, through the priesthood, he became all-powerful with the people, that power became the curb on its own bestowers. The clergy, from his satellites, were now his slaves. Their very subsistence was in his hands; the congregations tendered him no divided allegiance; his will was a decree above that of the Vatican; and Rome's amazed and trembling ministers saw him, as he stood even on the altar's steps, supreme and irresponsible, disobeying and denouncing Rome's rescript. There was no alternative but submission. They quailed before him, and pandered to the power they could not combat. His policy now, in their turn, they adopted. They organized his *primum mobile*, the rent; headed his pro-

cessions; bestowed their benediction on his monster meetings; and hailed, and hallowed, and all but crowned him on the hill of Tara. These were perilous ovations, and they did their work. Of all the slaves that swelled his triumphs, there was not one to whisper, 'Remember that thou art a man' — and he *forgot it*. Implicit obedience was the homage he demanded. Contradiction incensed him, equality affronted him; and, while invoking 'liberty,' he waved an iron sceptre. When emancipation became law, he had half the representation of Ireland in his hands. And how did he use an influence so responsible? Oriental in power and Oriental in principle, he entered St. Stephen's with a train of *mutes*.

"At the bar O Connell was an admirable *Nisi Prius* advocate — a shrewd, subtle, successful cross-examiner — an excellent detailer of facts — a skilful dissector of evidence. His speech in the case of the *King* v. *Magee*, is a noble specimen of his talents and intrepidity. This he published afterward as a pamphlet. Often his junior, I had the means of knowing that, in the management of a case, he was both discreet and dexterous. Toward the bench respectful, independent, and at times even stern, he was ever toward his colleagues sociable and kind. In Parliament, which he necessarily entered late, his success was only average. In the midst of his multiplicity of affairs, he read every novel of the day, and was a great reciter of poetry. Some of his parodies and poetical applications in debate caught the humor of the House, and were considered felicitous. Among these was his sneer at the smallness of Lord Stanley's personal adherents after some general election:

> 'Thus down thy hill, romantic Ashbourne, glides
> The *Derby Dilly*, carrying *six* insides.'

His celebrated parody on three very excellent, and certainly very good-humored members of Parliament, Colonels Sibthorp, Perceval, and Verner, was extremely ready, and produced a roar:

> 'Three colonels, in three distant counties born,
> Lincoln, Armagh, and Sligo did adorn.
> The first in matchless impudence surpassed,
> The next in bigotry — in both, the last.
> The force of nature could no further go —
> To beard the third, she shaved the other two.'

Two of these gentlemen looked as if they never needed a razor, and the third as if he repudiated one. Perhaps the drawback on this was its personality; but personality was one of his besetting sins It was his instant and invariable resource. He had a *nickname* for every one who presumed to thwart him — curt, stinging, and vulgar, suiting the rabble taste, and easily retained in the rabble memory. There was not a lord lieutenant or a secretary that did not carry away with him a not very welcome addition. Some of these were severe, and all of them insulting. But he was ever heedless of the pain he inflicted, if he gained a purpose.

"When posterity, bending over the page of his eventful life, shall rigidly inquire to what purpose were employed that despot power and boundless popularity, what must be the answer? Was it to bind mankind in bonds of brotherhood? to heal the wounds of an afflicted country? to cement the union of the whole human family? to include conflicting creeds and classes within the Christian circle of charity and peace? Let living Ireland speak. Where are now the countless multitudes that followed in his wake, and watched his glance, and worshipped his very footsteps? Where is now that name, which every hill, and vale, and glen in Ireland so often echoed to a population's voice? Who ever hears of it? Was

it not written in water? Oblivion has become, as it were, a national compact:

'Who put in popularity their trust,
But write in water, and but limn the dust.'

Indeed, every trace of him seems to have been studiously obliterated. Even his library, the favorite volumes with his autograph annotations, which, it might be presumed, Roman Catholic gratitude would have prized as so many relics, were depreciated and dispersed! But when life's pageanty had passed away, a duty still remained. Death was to be mocked. Hypocrisy's farce was perfect. No mummery was spared. A gorgeous worship displayed all the splendor of its pompous ceremonial. Mitred sorrow stood before the altar, a weeping populace surrounded the bier; and when the solemn organ pealed its last, and the anthem's lingering tones had died away, the prudent mourners, fearing the effect, perhaps, of grief prolonged. buried O'Connell and *his memory* together! Oh, popularity! thou fickle, false, and fetid idol, how long will man mistake thee for a deity!"

PLUNKET.

"Who is that square-built, solitary, ascetic-looking person, pacing to and fro, his hands crossed behind his back, so apparently absorbed in self — the observed of all, and yet the companion of none? It is easy enough to designate the man, but difficult adequately to delineate the character. Perhaps there never was a person less to be estimated by appearances: he is precisely the reverse of what he seems: externally cold, yet ardent in his nature; in manner repulsive, yet warm, sincere, and steadfast in his friendships; severe in aspect, yet in reality social and companionable — that is Plunket — a man of the foremost rank, a wit, a jurist, a statesman, an orator, a logician — the 'Irish Gylippus,' as Curran called him, 'in whom are concentrated all the energies and all the talents of his country.' Eminent at the bar, it is in Parliament we see his faculties in their fullest development. Yet, in the Irish House of Commons, his chief displays were on a single question — that of the Union; and in the British Parliament — that of the Roman Catholic Question. His style was peculiar, and almost quite divested of the characteristics generally to be found in that of his countrymen. Strong, cogent reasoning — plain, but deep sense — earnest feeling and imagery, seldom introduced except to press the reasoning or to illustrate it, were the distinguishing features of his eloquence: he by no means rejected ornament, but he used it severely and sparingly; and though it produced its effect, it was not directly, but rather collaterally and incidentally. He always seemed to speak for a purpose, never for mere display; and his wit, like his splendor, appeared to be struck out by the collision of the moment. In this, indeed, his art was superlative. There were passages which could not have been flung off extempore, and must have been the result of very elaborate preparation.

"There is a faculty possessed by him, of very rare acquisition, and certainly exereised with a facility without example — that of embodying his whole argument in some simile or allusion, never expected, but still marvellously and felicitously appropriate. This cannot be better exemplified than by the noble image so justly lauded by Lord Brougham in his sketch of Mr. Grattan. It is taken from one of his speeches in the Irish Court of Chancery, where, adverting to the limitation of suits by lapse of time, he so finely says, 'Time is ever mowing down, with his scythe in one hand, the evidences of title, wherefore the humane and considerate wisdom of the law places in his other hand an hour-glass, by which he metes out the

periods of possession that shall supply the place of the muniments the scythe has destroyed.' Surely never before, from materials so ordinary, nay, homely, was so just and beautiful an illustration deduced. The skill, too, with which he extricated himself from a difficulty was often admirable. Thus, in the debate on the Reform Bill, when compelled to reconcile his former hostility to such changes with his present advocacy of that great measure, he said, 'In those days reform came like a felon, and was to be resisted; it now comes as a creditor; you admit the justice of the demand, and only haggle on the instalments by which it shall be paid.'"

AVONMORE.

"Eminent in this society, and, indeed, in every other society of which he was a member, was Barry Yelverton, afterward Lord Avonmore, the early friend of Curran, the companion of all his dearest enjoyments, the occasional rival of his talents or victim of his whims, and, to the day of his death, the theme of his idolatry. His character has been drawn by Sir Jonah Barrington, in his admirable work on the Union, with a powerful hand, and scrupulous fidelity. Of Lord Avonmore I have myself a kind of early and affectionate recollection. When I was a schoolboy, he went as judge the circuit in which I resided — we were allowed vacation to go and *see the judges* — it was an era in the schoolboy's life I had never seen a judge before. Poor Lord Avonmore observed, no doubt, the childish awe with which my eyes wandered over the robe, the wig, the little cap of office, and all the imposing paraphernalia of judicial importance. He took me on the bench beside him — asked my name — my parents — my school; and after patting me on the head, and sharing his cakes with me, with much solemnity told me he would certainly return in summer *on purpose* to inquire whether I minded my learning! I fully believed him, fancied myself at least a foot taller, and was, in my own way, quite as vain as *grown up* children are of similar trifles. When I told Curran the circumstance, many a long day afterward, adding, at the time, I verily felt myself almost as consequential as the judge, 'O yes,' said he, the tear starting into his eye, 'and, take my word for it, that judge was every whit *as innocent as the schoolboy*.'

"'It would be difficult,' says Sir Jonah Barrington, 'to do justice to the lofty and overwhelming elocution of this distinguished man, during the early period of his political exertions. To the profound, logical, and conclusive reasoning of Flood — the brilliant, stimulating, epigrammatic antithesis of Grattan — the sweetened, captivating, convincing rhetoric of Burgh — or the wild, fascinating imagery and varied pathos of the extraordinary Curran, he was respectively inferior; but in powerful, nervous language, he excelled them all. A vigorous, commanding, undaunted eloquence burst in torrents from his lips — not a word was lost. Though fiery, yet weighty and distinct, the authoritative rapidity of his language, relieved by the figurative beauty of his luxuriant fancy, subdued the auditor without a power of resistance, and left him in doubt whether it was to argument or eloquence that he surrendered his conviction.

"'Amply qualified for the bench by profound legal and constitutional learning, extensive professional practice, strong logical powers, a classical and wide-ranging capacity, equitable propensities, and a philanthropic disposition, he possessed all the positive qualifications for a great judge. But he could not temporize: the total absence of skilful or even necessary caution, and the indulgence of a few feeble counteracting habits, greatly diminished that high reputation which a more cold, phlegmatic mien, or a solemn, imposing, vulgar plausibility, often confers on miserably inferior characters. As a judge, he certainly had some of those marked imper-

fections too frequently observable in judicial officers: he received impressions too soon, and, perhaps, too strongly; he was indolent in research, and impatient in discussion, the natural quickness of his perception hurried off his judgment before he had time to regulate it, and sometimes left his justice and his learning *idle spectators* of his reasons and his determination; while extraneous considerations occasionally obtruded themselves upon his unguarded mind and involuntarily led him away from the straight path of calm deliberation.

"He was a friend, ardent, but indiscriminate even to blindness — an enemy, warm, but forgiving even to folly. He lost his dignity by the injudiciousness of his selections, and sunk his consequence in the pliability of his nature: to the first he was a dupe, to the latter an instrument. On the whole, he was a more enlightened than efficient statesman, a more able than unexceptionable judge, and more honest in the theory than the practice of his politics. His rising sun was brilliant — his meridian, cloudy — his setting, obscure: crosses at length ruffled his temper, deceptions abated his confidence, time tore down his talent — he became depressed and indifferent; and, after a long life of checkered incidents and inconsistent conduct, he died, leaving behind him few men who possessed so much talent, so much heart, or so much weakness. This distinguished man, at the critical period of Ireland's emancipation, burst forth as a meteor in the Irish senate. His career in the Commons was not long, but it was busy and important: he had connected himself with the Duke of Portland, and continued that connection uninterrupted till the day of his dissolution. But, through the influence of that nobleman, and the absolute necessity of a family provision, on the question of the Union the radiance of his public character was obscured forever — the laurels of his early achievements fell withered from his brow; and after having with zeal and sincerity labored to attain independence for his country in 1782, he became one of its salemasters in 1800; and mingling in a motley crowd — uncongenial to his native character, and beneath his natural superiority — he surrendered the rights, the franchises, and the honors of that peerage to which, by his g[illegible] talents and his early virtues, he had been so justly elevated.

"'Except upon the bench, his person was devoid of dignity, and his appearance ordinary, and rather mean; yet there was something in the strong-marked lines of his rough, unfinished features which bespoke a character of no common description. Powerful talent was its first trait; fire and philanthropy contended for the next; his countenance, wrought up and varied by the strong impressions of his laboring mind, could be better termed indicatory than expressive; and in the midst of his greatest errors and most reprehensible moments, it was difficult not to respect, and impossible not to regard him.'

"Lord Avonmore loved a jest in his very heart. He could not resist it even upon the bench; and his friend, well aware of the propensity, used not unfrequently to wage war against the gravity of the judgment seat. He has often related, facetiously enough, an attack which he once made upon the mingled simplicity and laughter-loving disposition of the chief baron, who, with all his other qualifications, piqued himself, and very justly, on his profound classical acquisitions. He was one day addressing a jury of Dublin shop-keepers, so stupid and so illiterate that the finest flights of his eloquence were lost on them. 'I remember, gentlemen,' said he, stealing a side glance at the unconscious and attentive Lord Avonmore, 'I remember the ridicule with which my learned friend has been pleased so unworthily to visit the poverty of my client; and remembering it, neither of us can forget the fine sentiment of a great Greek historian upon the subject, which I shall take the liberty of quoting in the original,

as no doubt it must be familiar to all of you. It is to be found in the celebrated work of Hesiod called the *Phantasmagoria*. After expatiating upon the sad effects of poverty, you may remember he pathetically remarks,

> '"Nil habet infelix paupertas durius in se
> Quam quod ridiculos homines facit."'

Lord Avonmore bristled up at once: 'Why, Mr. Curran, Hesiod was not a historian — he was a *poet;* and, for my part, I never heard before of any such poem as the *Phantasmagoria*.' 'Oh, my good lord, I assure you he wrote it.' 'Well, well, it may be so; I'll not dispute it, as you seem to be so very serious about it; but, at all events, the lines you quoted are *Latin;* they are undoubtedly Juvenal's.' 'Perhaps, my lord, he quotes them from the Phantasmagoria.' 'Tut, tut, man, I tell you they're *Latin;* they're just as familiar to me as my Blackstone.' 'Indeed, my good lord, they're Greek.' 'Why, Mr. Curran, do you want to persuade me out of my senses? I tell you they're *Latin:* can it be possible that your memory so fails you?' 'Well, my lord, I see plainly enough we never can agree upon the subject; but I'll tell you how it can easily be determined. If it was a legal question, I should of course bow at once to the decision of your lordship; but it is not — it's a mere matter of fact, and there's only one way I know of deciding it: send it up as a collateral issue to that jury, and I'll be bound they'll — *find it Greek*.' The joke flashed upon the simplicity of Lord Avonmore — he literally shook with laughter; and, that the whole picture might preserve its *keeping*, Curran declared he extended his immense hand over the cheek that was next the jury-box, *by way of keeping them entirely out of the secret*."

Recent American Decisions.

Supreme Court of New York. — Albany, February Term, 1851.

Present, Justices Watson, Parker, and Wright.

B. O. Tayloe *v.* George Gould, et al., Executors, &c.

A testator, by his will, executed since the revised statutes went into operation, devised as follows: "Fourthly, I do give, devise, and bequeath to my beloved daughter, Julia Maria, the wife of B. O. T., and such her child or children as shall at her decease be living, and shall have attained, or shall thereafter attain, the age of twenty-one years, all and singular the rest and residue of my real and personal estate and property, of every description, of which I may die seised and possessed or entitled unto, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, to and for her sole and separate use, to all intents and purposes, as though she were a *feme sole*, and unmarried."

Held, 1. That the words "and such her child, or children," &c., were words of *purchase*, and not of *limitation*, and if not contrary to the statute against perpetuities, that Mrs. T. took only a life estate, with remainder to such of her children as should survive her, and should have attained, or should after her decease attain the age of twenty-one years.

2. That such remainder to the children was not vested, but contingent.

3. That assuming such contingent remainder to be valid, the property, intermediate the death of Mrs. T., and the time when her eldest child became of age, descended to, and vested in, the heirs at law, liable to be devested on the happening of the contingency upon which the remainder depended.

4. That when the contingency occurred by the eldest son becoming of age, the remainder vested in him, subject to be devested, so far as to let in to their shares respectively, such of the other children of Mrs. T. as should become twenty-one years of age.

5. That the estate, being limited on Mrs. T.'s life and five minorities, and being inalienable during such limitation, the contingent remainder to the children of Mrs. T. was void, as being contrary to the statute against perpetuities; and that the legal consequence was that as to the moiety of the estate thus disposed of, it descended to Mrs. T., as the heir at law of the testator, and united with her life estate.

6. That the devise was not a joint devise to Mrs. T. and her children.

7. That the devise over was equally void, as to the personal estate.

By the third clause of the same will, one moiety of the testator's estate was devised to his wife for life, and by the third devise of the fourth clause, was disposed of as follows: "But in case my said wife, A. E., shall be living at the time of my death, and shall die, my said daughter, J. M., surviving, or any of her my said daughter's children, who shall have attained, or shall thereafter attain, the age of twenty-one years, surviving my said wife, I do then and in such case give, devise and bequeath to my said daughter, J. M., if living at the time of the death of my said wife, or in case of her death, then to such her child or children as shall be living at the time of the death of my said daughter, and shall then have attained, or shall thereafter attain, the age of twenty-one years, her, his, or their heirs and assigns, all and singular the real and personal property herein before devised to my said wife, for and during her natural life." *Held*, that this devise was also void, both as to the real and personal estate, as contrary to the statute prohibiting perpetuities; being a limitation for two lives not only, but also for five minorities, in addition; and that the objection to its validity was not obviated by the fact of Mrs. T. dying before the testator's widow.

The validity of a devise must be determined from its terms, and without reference to future contingencies.

To entitle a husband to an estate as tenant by the curtesy, the wife must be seised in fact and in deed. It is not sufficient that she has a seisin in law of an estate of inheritance.

Hence, if there be an outstanding estate for life, the husband cannot be tenant by the curtesy of the wife's estate, in reversion or remainder, unless the particular estate be ended during the coverture.

There can be no seisin in fact of a vested remainder limited on a precedent freehold estate.

Where a life estate, and the immediate reversion, meet in the same person, the particular estate is merged in the greater estate; and if the two estates unite in a *feme covert*, her husband is entitled to a life estate, as tenant by the curtesy.

A limitation upon minorities is virtually a limitation upon lives.

JOHN D. DICKINSON died in Troy, N. Y., in January, 1841, possessed of a large real and personal estate, and leaving a will executed in October, 1838.

By the first clause of his will he directed all his debts to be paid out of his personal estate and the rents and income of his real estate. By the second clause he devised and bequeathed to his wife, Ann Eliza, if living at the time of

his death, for and during her natural life, his dwelling-house in which he resided, and all the goods, household furniture, plated ware, and silver plate, &c., &c., in and belonging to his said dwelling-house and establishment, and all his carriages, horses, &c., &c. All the personal property was bequeathed to his wife absolutely, except the plated ware and silver plate, which was bequeathed to her during widowhood.

By the third clause he devised and bequeathed to his said wife, if living at the time of his death, the one equal moiety of all the residue of his personal estate, and the rents, issues, and profits during her life, of the equal undivided moiety of the residue of his real estate, in lieu of dower.

The fourth clause was in the following words:

"*Fourthly*, I do give, devise, and bequeath to my beloved daughter, Julia Maria, the wife of Benjamin Ogle Tayloe, and such her child or children as shall at her decease be living, and shall have attained, or shall thereafter attain the age of twenty-one years, all and singular the rest and residue of my real and personal estate and property of every description, of which I may die seised and possessed, or entitled unto, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, to and for her sole and separate use, to all intents and purposes as though she were a feme sole and unmarried; but in case my said wife shall die before my decease, I do then, and in such case, give, devise and bequeath, all and singular, my real and personal estate and property, and the rents, issues and profits thereof, hereinbefore devised to my said wife, to my said daughter, Julia Maria, and such her child or children as shall at her decease be living, and shall have attained, or shall thereafter attain the age of twenty-one years, to and for her sole and their sole and separate use, as fully and absolutely as though she, my said daughter, were a feme sole, and unmarried. But in case my said daughter, Julia Maria, shall die, my said wife surviving her, not leaving any lawful issue, child or children who shall have attained, or shall thereafter live and attain the age of twenty-one years, and not leaving lawful issue living at the time of his, her or their death or deaths, I do then, and in such case, give, devise and bequeath, all and singular, the real and personal estate hereinbefore devised to my said daughter, to my beloved wife, Ann Eliza, and to her heirs and assigns forever. But in case my said wife, Eliza Ann, shall be living at the time of my death, and shall die, my said daughter, Julia Maria, surviving, or any of her, my said daughter's children, who shall have attained, or shall thereafter attain the age of twenty-one years, surviving my said wife, I do then and in such case, give, devise and bequeath to my said daughter, Julia Maria, if living at the time of the death of my said wife, or in case of her death, then to such her child or children as shall be living at the time of the death of my said wife, or at the death of my said daughter, and shall then have attained, or shall thereafter attain the age of twenty-one years, her, his or their heirs and assigns, all and singular, the real and personal property hereinbefore devised to my said wife, for and during her natural life; but in case my said wife shall not be living at the time of the death of my said wife, and shall not have left any child or children, or the lawful issue of any child or children living, who shall then or shall thereafter attain the age of twenty-one years, I do then, and in such case, give, devise and bequeath, all and singular, the real and personal estate last aforesaid, to such person or persons as may be entitled to the same as my heir or heirs at law.

"I do hereby constitute and appoint my beloved wife, Ann Eliza, executrix, and my son-in-law, Benjamin Ogle Tayloe, Daniel D. Barnard, Alanson Douglass and George Gould, Esquires, executors of this my last wil and testament; and I do hereby authorize and empower my said executrix and executors, and the survivors and survivor of them, to sell and dispose of any part of my real estate, (excepting my dwelling-house with the lot and appurtenances thereto belonging hereinbefore devised to my said wife for and during her natural life,) or in their discretion to leave the same or any part thereof in fee, or for a term or terms of years, reserving thereon a reasonable and proper rent, my said executrix while living, in all cases of sale or other disposition of my said real estate, first assenting to and approving thereof."

The testator left surviving him his widow, Ann Eliza, his only child, J. M. D. Tayloe, and her five children, by her husband, B. O. Tayloe, the eldest of whom, John D. Tayloe, was then fourteen years of age.

Mrs. Tayloe, the daughter of the testator, died at the city of Washington, in July, 1846, leaving her surviving, the said five and no other children; and her said mother, Ann Eliza, the widow of the testator, died on the 12th of January, 1847, leaving her surviving, the said five children of her said daughter, Julia Maria D. Tayloe, none of whom had then attained the age of twenty-one years. The will was duly proved and recorded as a will of real and personal estate, on the 18th day of February, 1841; and letters testamentary were issued thereon to the said widow, Ann Eliza Dickinson, the defendant, George Gould, and the complainant. John Dickinson Tayloe became twenty-one years of age on the 22d of May, 1847.

The complainant filed his bill in equity in this Court in April, 1848, and claimed, 1st. That, as husband of the daughter of the testator, he was entitled, from the time of the death of the testator to the time of the decease of his widow, to the rents and profits of one undivided half part of the real estate of which the testator died seised, except that part of which the exclusive use and enjoyment was devised to the wife of the testator for life. 2. That, since the death of the said widow, he was entitled to the rents and profits of all the real estate of which the testator died seised. 3. That as husband of the daughter of the testator, or as her administrator, he was entitled to one undivided half of all the personal estate of which the testator died possessed, except those articles which were specifically devised to the wife of the testator absolutely.

The facts above stated, appearing on bill and answers and proofs taken, the infants having appeared and put in

general answers by guardian, an order was entered, that the cause be heard at general term.

D. D. Barnard, for the complainant.

S. Stephens, for George Gould, and the infant defendants.

By the Court, PARKER, J. The first question to be determined is, What estate Mrs. Tayloe took under the following language of the will.

"Fourthly, I do give, devise and bequeath to my beloved daughter Julia Maria, the wife of Benjamin Ogle Tayloe, *and such her child or children as shall at her decease be living and shall have attained, or shall thereafter attain, the age of twenty-one years*, all and singular the rest and residue of my real and personal estate and property, of every description, of which I may die seised and possessed, or entitled unto, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, to and for her sole and separate use, to all intents and purposes, as though she were a feme sole and unmarried."

The plaintiff claims that the words "and such her child or children," &c., are words of *limitation*, and that under this devise Mrs. Tayloe took an estate in fee. On the other hand, the defendants contended that the words above quoted, are words of *purchase*, giving a remainder to the persons described, and that Mrs. Tayloe took only a life estate.

The rule in *Shelley's Case*, (1 Coke's Rep. 104,) which prevailed in the Courts for so long a time, against the manifest intention of the testator, has been abolished in this State, by the Revised Statutes, which provide, (1 Rev. Stat. 725, § 28,) that where a remainder shall be limited to the heir or heirs of the body of a person to whom a life estate in the same premises shall be given, the parties who, on the termination of the life estate, shall be the heir or heirs of the body of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them. Before the enacting of this statute, the general rule was, that when a person took an estate of freehold, under a deed, will, or other writing, and in the same instrument there was a limitation by way of remainder to his heirs, or the heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitled the ancestor to the whole estate. (1 Prest. on Est. 263, 419; 4 Kent, Com. 215, 2d ed.) But even then, if the testator annexed words of explanation to the word "heirs," as, to the heirs of A., *now living*, showing thereby that he meant by the word heirs, a mere

descriptio personarum, or specific designation of certain individuals, it was to be regarded as a word of purchase. (*Burchett* v. *Durdant*, 2 Vent. 311; S. C. Carth. 154; 4 Kent, Com. 221.) Mr. Hargrave (Har. Law tracts, 489,) gave to the rule an absolute application, when the testator did not intend to break in upon and disturb the line of descent from the ancestor, but used the word "heirs," as a *nomen collectivum* for the whole line of inheritable blood. But the rule was never applicable when there was a distributive direction given, incompatible with the ordinary course of descent. (4 Kent, Com. 230.)

It seems to me very plain that the words in the will under consideration, tested even by the rigid rule as it stood before the adoption of the Revised Statutes, would be regarded as words of purchase, and not as words of limitation.

It was the intention of the statute to abolish entirely the rule in *Shelley's Case*. (Reviser's notes, 2 Rev. Stat. 2d ed. 575.) It was only where the word "heirs," or "heirs of the body," were used, that the technical language employed necessarily defeated the obvious intent of the testator; and therefore the statute provides only for cases of that character. Where other words were employed by the testator, though of similar meaning, their construction was governed by the intention of the testator, as gathered from the whole instrument, and the facts of the case. The word "issue," may be a word of purchase or of limitation, as will best suit the intention of the testator. (8 Petersd. Abr. 186, and the cases there cited; 5 Term R. 305; 1 Ld. Raym. 207.) Chancellor Walworth says in *Schoonmaker* v. *Sheely*, (3 Denio, 490,) "the word children, in its primary and natural sense, is always a word of purchase, and not a word of limitation; and the word issue, is very frequently a word of purchase also. But heirs, and heirs of the body, are, in their primary and natural sense, words of limitation, and not of purchase." The devise in this case is not to those who would take as a class, by descent, but to such of them as should be living at the death of their mother, and as should have attained, or should thereafter attain, the age of twenty-one years. It is only a description of the persons succeeding to the estate.

I think it is apparent, from the clause under consideration, as well as from the whole will, and the circumstances surrounding the testator at the time of its execution, that

he intended only a life estate for Mrs. Tayloe, with remainder to such of her children as should survive her, and should have attained, or should after her decease attain, the age of twenty-one years. The words used are, in their usual sense, words of purchase, and not of limitation. The testator intended to give the property to a part only of Mrs. Tayloe's children, viz., to such as should survive her, and should become of full age. He devised the property to Mrs. Tayloe's sole and separate use. She was evidently to have the use of it for life, for it was only given to such as should survive her.

Was the remainder to the children vested or contingent? The statute has provided the definition of these words, by which we are to be governed. Estates are *vested* where there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are *contingent* whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain. (1 Rev. Stat. 723, § 13; *Hawley* v. *James*, 5 Paige, 466.) Although the five children of Mrs. Tayloe were in being at the time of the death of the testator, yet none of them would have had an immediate right to the possession of the lands, on the termination of Mrs. Tayloe's life estate. That right depended on the additional contingency of their arriving at twenty-one years of age. In the language of the statute, the event upon which it was limited to take effect remained uncertain. The estate did not vest in the children, on the death of the testator. It went only to those who survived their mother and became of age. If one of them became twenty-one years of age, he would still have no title, unless he was living at the decease of his mother; and if after attaining twenty-one years of age, he married, and died before his mother, leaving issue, his issue could not inherit. The remainder to the children was not vested, therefore, but contingent.

Assuming this contingent remainder to be valid, it may be asked, When did an estate vest intermediate the death of Mrs. Tayloe and the time when her eldest son became of age? That is to say, from July 1846 till the 21st of May, 1847. If this is not provided for in the will, the property descended in the mean time to the heirs at law, liable to be devested on the happening of the contingency upon which the remainder depended. In a subsequent part of the will, it is provided that if Mrs. Tayloe shall die, the testator's

wife surviving, and shall not leave any lawful issue, child or children who shall have attained, or shall thereafter attain, the age of twenty-one years, &c., the property shall go to his wife, and to her heirs and assigns forever. If this devise is valid, and if it was vested, under the definition above given, the property, after the death of Mrs. Tayloe, vested in her mother, Mrs. Dickinson, liable to be devested on the contingency of Mrs. Tayloe's children, or any one of them, attaining the age of twenty-one years, and continued thus in Mrs. Dickinson till her death in January, 1847, when it vested in the heirs at law, viz: in all the children of Mrs. Tayloe, subject to be defeated by the same contingency. That when that contingency occurred in May, 1847, by John D. Tayloe becoming of age, the remainder vested in him, subject to be divested so far as to let in, to their shares respectively, such of the other children of Mrs. Tayloe as should become twenty-one years of age. But it is unnecessary to decide whether the estate, after the death of Mrs. Tayloe, vested in Mrs. Dickinson till her death, or whether it vested in the heirs of the testator during the whole time from the death of Mrs. Tayloe till her eldest son became of age. It is well settled that when no provision is made in the will, the property descends to the heir at law until the vesting of the contingent estate. (*Jackson* v. *Winne*, 7 Wend. 47.)

I have thus far examined the interests of the parties as they apparently exist, according to the terms of the will. But it is insisted that the future contingent devise to the children is void on the ground that it violates the statute against perpetuities. The revised statutes (1 Rev. Stat. 723, § 14,) declare every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in that article; and further declare such power of alienation suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed. The next section provides that the absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate.

Here was a devise to Mrs. Tayloe for life, remainder to such of her children as should be living at her death, and should then be, or should thereafter become, twenty-one years of age. This limitation extends as well to children

unborn as those in being; and for that reason it is not sustainable. But if confined to the five children then in being, all of them might survive their mother, and might live till the youngest of them became twenty-one years of age, and though no more should be afterwards born, the estate might remain contingent until the expiration of the minority of the youngest child. The estate was then limited on Mrs. Tayloe's life and five minorities, and during such limitation the estate was inalienable.

It is unnecessary to discuss the construction of the statute prohibiting perpetuities. This has been very elaborately performed, and the rule established in several reported cases. The limitation must be measured by lives only, or by some term that cannot exceed the measure of two lives in being. (*Hawley* v. *James*, 16 Wend. 61; *Gott* v. *Cook*, 7 Paige, 521; S. C. 24 Wend. 641; 14 Wend. 265; 18 Ib. 257; 1 Barb. Ch. R. 18.) In *Hawley* v. *James*, the Court for the correction of errors decided that a limitation "until the youngest of a testator's children and grandchildren attaining the age of twenty-one years, shall have attained that age," when the number exceeds *two* is void, as suspending the power of alienation of an absolute fee in possession for more than two lives in being. The principle decided in *Hawley* v. *James*, is precisely applicable to the case now before us; and it is only necessary to refer to it to show that the remainder to the children of Mrs. Tayloe is a violation of the statute. A limitation upon minorities is virtually a limitation upon lives. If two of the lives terminate before all attain majority, then, the estate having been held for two lives, its further continuance during the residue of the minorities extends it beyond two lives, and the whole limitation is void. It is no answer to say that the estate might terminate during the life of Mrs. Tayloe, by the death of all her children. The possibility that the estate may extend beyond the limits allowed, vitiates it, *ab initio*. (16 Wend. 121; 4 Cruise, 449; 4 Kent, 283; 2 Burr. 873.) The estate must by the terms of its creation be restricted within the required limit, or it is void. There is no exception to the rule established by § 14 and 15 of the statute, except that stated in § 16, and that is inapplicable to this case.

I am clearly of the opinion, therefore, that the contingent remainder to the children of Mrs. Tayloe is void. The legal consequence is, that as to the moiety of the estate thus

disposed of, it descended to Mrs. T. as the heir at law of the testator, and united with her life estate.

It was suggested on the argument that the devise we have been considering might be a joint devise to Mrs. Tayloe and her children. (*Oates* v. *Jackson*, 2 Strange, 1172; Co. Litt. 9, 188; Pollexf. 373.) But there is nothing in the language employed, to require such a construction; and I have already stated several reasons why I think it was not so intended. I do not see how Mrs. Tayloe could take jointly with her children, when the property could not vest in the children till after her death. Other provisions in the will show that it was not the intention of the testator to devise property jointly to Mrs. Tayloe and her children. In the third devise of the fourth clause the moiety devised for life to Mrs. Dickinson, was given, after her death, to Mrs. Tayloe, if living, and if not, then to the same children designated as in the other devise. But if the devise was joint, the power of alienation was suspended for the same length of time as if the devise was to Mrs. Tayloe for life, remainder to the children. Because, if the devise was joint, the extent of interest in each of the devisees would be changing and contingent, until the youngest child should have become of age. The absolute power of alienation would be therefore suspended for a longer time than is allowed by statute, and the devise consequently void, so that the property would, as in the other case, descend to Mrs. Tayloe as the heir at law.

I proceed next to consider the other moiety of the estate. This, by the third clause of the will, was devised to Mrs. Dickinson for life, and by the third devise of the fourth clause was disposed of as follows: "But in case my said wife Ann Eliza, shall be living at the time of my death, and shall die, my said daughter Julia Maria surviving, or any of her my said daughter's children who shall have attained or shall thereafter attain the age of twenty-one years, surviving my said wife, I do then and in such case, give, devise and bequeath to my said daughter Julia Maria, if living at the time of the death of my said wife, or in case of her death, then to such her child or children as shall be living at the time of the death of my said wife, or at the death of my said daughter, and shall then have attained, or shall thereafter attain the age of twenty-one years, her, his, or their heirs and assigns, all and singular the real and personal property herein before devised to my said wife for and during her natural life."

This is still more plainly, if possible, a violation of the statute prohibiting perpetuities. It is a devise for life to Mrs. Dickinson, then to her daughter Mrs. Tayloe, and then remainder to such of the children of the latter as should attain majority. It is a limitation for two lives not only, but also for five minorities in addition. In other words, it is a limitation for seven lives. It is no answer to say that Mrs. Tayloe died before Mrs. Dickinson. It might have been otherwise; and the validity of the devise must be determined from its terms, and without reference to future contingencies. But if this devise be regarded only as a limitation for life to Mrs. Dickinson with remainder to such of the children of Mrs. Tayloe as should attain majority, it is still void for the reasons above stated in considering the first devise of the fourth clause. Then both devises would stand upon the same footing. The consequence is, that this moiety also of the estate, at the death of the testator, descended to Mrs. Tayloe as heir at law, subject to the life estate of Mrs. Dickinson.

The plaintiff claims that as husband of Mrs. Tayloe he is entitled to a life estate as tenant by the curtesy in all the real estate left by the testator. Four things are requisite to an estate, viz: marriage, actual seisin of the wife, issue, and death of the wife. The only question here is, whether there was such a seisin of the wife as will support the plaintiff's claim.

I have already shown that one moiety of the real estate was devised to Mrs. Dickinson for life, and the remainders being void it descended to Mrs. Tayloe as the heir at law, subject to such life estate. Mrs. Tayloe died before the termination of the life estate. To entitle the husband to his curtesy, the wife must be seised in fact and in deed. It is not sufficient that she has a seisin in law of an estate of inheritance. (4 Kent, Com. 29; *Jackson* v. *Johnson*, 5 Cowen, 74, 98; *Bates* v. *Shraeder*, 13 John. 260; *Jack-* v. *Hilton*, 16 John. 96.) It has been accordingly held, that if there be an outstanding estate for life, the husband cannot be tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during the coverture. (Co. Litt. 29 *a*; *De Grey* v. *Richardson*, 3 Atk. 469; 4 Kent, Com. 29.) There can be no seisin in fact of a vested remainder limited on a precedent freehold estate. (1 Co. Litt. 32 *a*; Cruise, Dig. ch. 2, tit. Dower, § 12 to 16; *Blood* v. *Blood*, 23 Pick. 80; 7 Mass.

Rep. 253; 5 N. Hamp. Rep. 240; 5 Ib. 469; *Green* v. *Putnam*, 1 Barb. Sup. C. Rep. 506; *Dunham* v. *Osborn*, 1 Paige, 634; *Reynolds* v. *Reynolds*, 5 Ib. 161; *Matter of Cregier*, 1 Barb. Ch. Rep. 598.) In the last cited case the Chancellor reviewed the case of *Bear* v. *Snyder*, (11 Wend. 592,) where a different opinion had been held.

As to the moiety of the real estate, therefore, which was devised to Mrs. Dickinson for life, the life estate not having ended till after the coverture was terminated by the death of Mrs. Tayloe, the plaintiff is not tenant by the curtesy; but the children of Mrs. Tayloe take it, free from such incumbrance.

With regard to the other moiety of the real estate left by the testator, Mrs. Tayloe was seised in fact of it during the coverture. The life estate devised to her by the testator was merged in the greater estate which she took as heir at law. Such is the legal effect of the meeting of the particular estate and the immediate reversion in the same person. (4 Kent, Com. 99, 100; 3 Prest. on Con. 182, 261.) The plaintiff has, therefore, a life estate, as tenant by the curtesy, in that moiety of the real estate.

The devises over are equally void as to the personal property. The absolute ownership of personal property cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the death of the testator. (1 Rev. Stat. 773, § 1 and 2; *Rathbone* v. *Dyckman*, 3 Paige, 30; *Hannam* v. *Osborn*, 4 Ib. 342.) The plaintiff, therefore, as administrator of his wife, is entitled to one half of the personal estate from the time of the death of his wife. (2 Rev. Stat. 75, § 29; Ib. 98, § 79; 2 Kent, Com. 135; 6 John. Rep. 112; 7 John. Ch. Rep. 229.) The plaintiff is entitled to an account of all the personal property to which his wife was entitled as next of kin of the testator.

There must, therefore, be a decree declaring and adjudging the rights of the parties in accordance with the above conclusions, and providing for a reference to take and state the account. All further questions are reserved until the coming in of the referees' report.

Supreme Court. — Albany, February Term, 1851.

WATSON, PARKER, and WRIGHT, Justices.

NILES & RICHMOND *v.* CULVER & FOOTE.

A memorandum, acknowledging the receipt of a specified number of barrels of apples, "in store," *to be forwarded to New York*, at so much per barrel, is a *contract* between the parties; and the general rule is therefore applicable, that parol evidence cannot be received to add to or vary its terms.

All oral negotiations or stipulations between the parties, preceding or accompanying the execution of such an instrument, are to be regarded as merged in it; and the receipt is to be treated as the exclusive medium of ascertaining the agreement entered into by the parties.

A distinction exists between a mere receipt acknowledging money paid, and a receipt containing an agreement, condition or stipulation between the parties; the latter is in the nature of a contract, and cannot be varied by parol evidence.

THIS was an action on the case upon a contract to carry 245 barrels of apples from Utica, to the city of New York. The plaintiffs alleged that in consequence of the carelessness, neglect and delay of the defendants, the apples were injured, and their value lost. The defendants pleaded the general issue. On the trial in the Court below, it was admitted by the defendants, that they were copartners in the forwarding business, on the Erie canal; that they were owners of a store or freight-house in the city of Utica, and of the canal boat Albion, and other boats, and that the plaintiffs were the owners of 245 barrels of apples, at the city of Utica, on the 27th April, 1847. The plaintiffs then offered to prove by a witness who was present on that day at the store-house of the defendants, that an agreement was made between Niles and Culver, by which the defendants agreed to receive the 245 barrels of apples, and to forward the same by the canal-boat Albion, safely and without any detention or delay, and without reshipment, to the city of New York, to the plaintiff Richmond, at 101 West street; that the defendants agreed that the Albion should go to the city of New York, and should leave Utica upon the opening of the canal navigation, on the 1st of May, and should arrive at New York on the 7th of May, unless prevented by some breakage or defect of the canal; and that the plaintiffs agreed to pay the defendants forty-four cents per barrel for the transportation and delivery of the same; that said agreement was verbal, and that immediately after the making thereof, the plaintiff Niles, and the witness, procured spring carts and proceeded to the delivery of the apples,

from the railroad depot to the store-house of the defendants, a distance of about half a mile. The defendants' counsel objected to giving parol evidence of the contract, on the ground that a receipt was given by the defendants to the plaintiffs for the apples, in which receipt the contract between the parties was expressed; and he called upon the plaintiffs to produce the said receipt. The receipt was produced by the plaintiffs, and admitted to have been executed after the conversation or agreement offered to be proved by the witness, and on the day it bore date. It was as follows:

"No. 146. *Utica, April* 27, 1847.
Received in store on account of Ira D. Richmond, *from* Justice Niles, two hundred and forty-five barrels of apples, to forward to New York, at forty-four cents per barrel, and advanced ten dollars and cartage, $4.81.
245 Brls. apples. CULVER & Co."

The words in italics were printed; the residue written. The counsel for the defendants then claimed that the parol agreement, as offered to be proved, was not competent evidence, inasmuch as it appeared that the agreement between the parties was reduced to writing at the time, in the receipt which had been produced. The counsel for the defendants also insisted that a joint action could not be maintained by the plaintiffs, according to the terms of said written agreement or receipt; and that the same could not be altered or varied by parol evidence. The plaintiffs' counsel contended that it was competent for the plaintiffs to recover upon the parol agreement made between the parties, upon which the property was delivered; and that the receipt given upon the delivery of the 245 barrels of apples, did not alter or destroy the parol agreement. That the terms of the receipt did not contradict, and were not inconsistent with the parol contract; and also that the receipt did not specify the time or manner in which the 245 barrels were to be forwarded to New York.

The judge decided that the parol agreement was cancelled and merged in the written agreement, and that the writing furnished the only competent evidence of the agreement between the parties, and he therefore excluded the evidence offered to be given. To which decision the plaintiffs excepted. No further evidence was offered or given by the plaintiffs; and they having rested their cause, the counsel for the defendants moved for a nonsuit; which motion was

granted, and the plaintiffs excepted. The plaintiffs now moved for a new trial.

K. Miller, for the plaintiffs.

J. A. Spencer, for the defendants.

By the Court, PARKER, J. It has long been established, that a receipt is not conclusive upon the party who has signed it. It may be explained, varied or contradicted, by parol evidence. (1 Phil. Ev. 108; 1 Cow. & Hill's notes, 213, and the cases there cited.) And this extends to a receipt incorporated in another instrument; as where, in a deed, there is the usual clause acknowledging the receipt of the consideration money, evidence is admissible to contradict such clause, by showing that the money was not in fact paid. (1 Cow. & Hill's notes, 217, and cases there cited.) So a bill of goods, with a receipt in full at the bottom, may be met by showing that the note of a third person, instead of money, was received for the goods, under circumstances which did not operate as a payment; the note having proved unavailable. (*Johnson* v. *Weed*, 9 John. R. 310.)

A distinction is, however, taken between a mere receipt acknowledging money paid, and a receipt containing an agreement, condition, or stipulation between the parties. The latter is in the nature of a contract, and is not liable to be varied by parol evidence. (1 Cow. & Hill's Notes, 216; 2 Ib. 1439.) A bill of lading, for example, is both a receipt and a contract to carry and deliver, and cannot be varied or contradicted. A clean bill of lading, which imports that the goods are stowed under deck, cannot be varied by a contemporaneous parol contract by which they were to be stowed on deck. *Creesy* v. *Holly*, (14 Wend. 26); *Barber* v. *Brace*, (3 Conn. Rep. 9.) Nor can a bill of lading be contradicted as to the course designated in it, which the vessel is to take. *May* v. *Babcock*, (4 Ham. Ohio Rep. 334.) In *Barret* v. *Rogers* (7 Mass. Rep. 297), in was indeed held that the admission in a bill of lading of the articles being in *good order* was not conclusive. But that decision was based upon a fraud supposed to have been practised by the shipper: the property shipped being velvets in cases, and not open to inspection. Sedgwick, J., said, "If the property to be transported, and which was declared to be 'in good order' was in all parts open to inspection, and no fraud or imposition was practised, it might not be unreasonable to say that no evidence should

be admitted to prove that it was not in good order." All contracts are open for examination when fraud is alleged. *Creesy* v. *Holly, supra.*

In *Goodyear* v. *Ogden & Pearl* (4 Hill, 104), the suit was upon a receipt in the following form: "Genoa, Sept. 22, 1841. Rec'd of Jonas Goodyear $40\frac{1}{100}$ bushels of wheat, *in store.* D. Ogden & Co." The Court held the receipt was a contract, or in the nature of a contract, and therefore not open to contradiction, under the rule applicable to receipts proper; and the defendants were not permitted to prove the language and conduct of the plaintiff, implying that a sale and not a bailment was intended.

I think the receipt in question in this cause is of the same character, and subject to the same rules. It is the contract between the parties; and the general rule is therefore applicable, that parol evidence cannot be received to add to, or vary, its terms. (2 Cow. & Hill's Notes, 1467, and cases there cited.) "All oral negotiations or stipulations between the parties, which preceded or accompanied the execution of the instrument, are to be regarded as merged in it; and the latter is to be treated as the exclusive medium of ascertaining the agreement to which the contractors bound themselves." If a bill of sale contains no warranty, but a simple transfer of title, the vendee cannot set up a parol warranty, made prior to, or at the time of the sale. *Mumford* v. *McPherson*, (1 John. Rep. 414.) It must be presumed the writing contains the entire contract. *Van Ostrand* v. *Reed*, (1 Wend. 424, 432); *Reed* v. *Wood*, (9 Wend. 285); *Dean* v. *Mason*, (4 Conn. Rep. 426); *Bayard* v. *Malcom*, (1 John. Rep. 467.) Where a promissory note mentions no time of payment, the law adjudges it to be due immediately; and parol evidence is not admissible to show a different time of payment agreed upon by the parties at the time it was executed. *Thompson* v. *Ketcham*, (8 John. 189); *Hunt* v. *Adams*, (7 Mass. Rep. 518; 6 Ib. 519;) *Pattison* v. *Hull*, (9 Cowen, 747.) Where a contract specifies no place for the delivery of portable articles, the law fixes the place; and evidence of contemporaneous stipulations, to vary the instrument in this respect, is inadmissible. *La Farge* v. *Rickert.* (5 Wend. 187.) Where a writing is silent as to the time in which an act is to be done, the law implies that it is to be performed in a reasonable time; and evidence as to a contemporaneous parol agreement as to the time is inadmissible. *Barringer*

v. *Snead*, (3 Stewart's Rep. 201); *Stimpson* v. *Henderson*, (1 Moo. & Malk. 300; 2 Cow. & Hill's Notes, 1470, 1471.)

In this case the receipt subscribed by the defendants was clearly the written contract between the parties. No fraud was alleged, and the parties were bound by the terms of the contract, and by the inferences and conclusions which the law, or the well established customs of trade, might draw from it. All previous agreements and stipulations were merged in the contract.

There is another difficulty in the way of maintaining this action. The instrument shows that the contract was made with Ira D. Richmond, and not with these plaintiffs. (1 Chit. Pl. 8.) I think the judge decided correctly, at the Circuit, and that a new trial should be denied.

Recent English Decisions.

Court of Common Pleas.—Hilary Term, Jan. 30, 1851.

DOE *d.* BLAKISTON *et al.* v. HASLEWOOD *et al.*

A testator, by his will, devised an estate to his wife for life, with remainder in fee to his nephew, with a proviso, that in case the testator's wife should at his decease be pregnant with a child, the devise to the nephew was to cease, and such child was to take the remainder in fee. At the time of making his will the testator had no child, and he was expecting to die; but a child was afterwards born in his lifetime, and the testator made a codicil to his will, devising after-acquired property to such child. The wife was not *enceinte* at the death of the testator: — *Held*, that the child born in the testator's lifetime had no estate under the will, and that, as there was no posthumous child, the devise to the nephew took effect.

The case of *White* v. *Barber* (5 Burr. 2703) is not law.

THIS was an action of ejectment. The terms of the devise, and the facts of the case, sufficiently appear in the marginal note, and in the opinion of the Court.

The cases cited by the counsel for the lessors of the plaintiff, were *Bootle* v. *Blundell*, 19 Ves. 502; *Driver* v. *Frank*, 6 Price, 41; *Boreham* v. *Bignall*, 14 Jur. 265; and *Bird* v. *Luckie*, 14 Jur. 1015; to the point, that Courts are not to conjecture what the testator intended, but to construe the will according to the intention as collected on the face and from the language of the will. The cases of *Barnes* v. *Crowe*, 1 Ves. 486; *Hulme* v. *Heygate*,

1 Mer. 285; *Rowley* v. *Eyton*, 2 Mer. 128; *York* v. *Walker*, 12 M. & W. 591; and *Goodtitle* v. *Meredith*, 2 Mau. & Sel. 5; were cited to the point, that the will and codicil must be read together as one instrument as of the date of the codicil, unless a contrary intention is shown; and the onus of showing this lies on the defendants.

The counsel for defendants cited, *Meadows* v. *Parry*, 1 V. & B. 124; *Murray* v. *Jones*, 2 V. & B. 313; *Mackinnon* v. *Sewell*, 2 My. & K. 202; *Wilson* v. *Mount*, 2 Beav. 397; to the point, that the Court should not adhere to the strict meaning of the words, but should give effect to the testator's intention, a different state of things having arisen from what was contemplated by him at the time he made his will. They also relied on the case of *White* v. *Barber*, 5 Burr. 2703.

Jervis, C. J. — I am of opinion, in this case, that the nephew took an estate in fee after the wife's death, and that the rule must, therefore, be made absolute for entering a verdict for the plaintiff. There seems no difficulty as to the principle which ought to govern this case; the difficulty is to apply that principle. We must take it that there is a positive devise to the wife for her life, with remainder to the nephew in fee; and to construe the will in favor of the defendants, there must be shown to be an intention to defeat that devise. The rule is clear, that the intention must be apparent on the face of the will, and that there should be words used capable of carrying that intention into effect. It was assumed, on the argument for the defendants, that the testator was apprehensive of immediate death at the time of making his will, and that he then had no children. It was said that he contemplated not only his wife being enceinte and having a child, but the possibility of her having one at any time afterwards; but that is to suppose an intention different from that which was in the mind of the testator. The testator's intention at the time he made his will was to provide for a posthumous child; in the event contemplated, he says: "If I die, leaving my wife at my decease pregnant with a child, then the devise in favor of my nephew is to cease." The defendants wish us to go away from that which was then the existing intention of the testator, and for us to infer that he intended by his will to provide for children born in his lifetime, if the event he then contemplated should not happen. But I cannot do so; for the testator knew that if

a child should afterwards be born in his lifetime, it was competent for him, if he thought fit, to revoke his will. It seems to me, therefore, that the principal matter is wanting, which is the condition of the rule, namely, an intention. It was assumed, in the argument by the defendants, that there was such intention; but I think, that, taking into consideration the then present intention of the testator to make a provision for a posthumous child, the will shows a contrary intention to what the defendants assumed, and that it is unnecessary to speculate on what the testator might have done in another state of things. I cannot fail to see that this decision may be said to conflict with *White* v. *Barber;* but if it be necessary to depart from that case, I am prepared to do so, as I do not think that that case was correctly decided. In that case the Court gathered the intention from the will, but they supplied a devise, deeming it impossible that the father would provide for a posthumous child, leaving children in esse unprovided for. That is, in my opinion, a direct violation of authority, and must be overruled. It is not necessary in the present case to consider the fact of the codicil, if the will has, as I think it has, the effect of excluding the child born in the testator's lifetime.

Maule, J. — I am of the same opinion, that the nephew is entitled to take under the devise in the will of his uncle. This is in a great measure opposed to the case of *White* v. *Barber*. That decision I understand in the sense in which Coleridge, J., understood it in *Morrall* v. *Sutton*, (1 Ph. 533.) In *White* v. *Barber* the Court inferred, from the relation in which the testator stood to the different claimants to the property, that it was in the highest degree improbable he should not intend to provide by his will for one of the classes, which, in their judgment, was nearer his affections than the nephew, who was clearly intended by the will to take in some event. I do not think that that is sound law. Unless we can find apt words to carry out the intention, however we may be satisfied that it was the intention of the testator to do something, we cannot give effect to it. In the case of *White* v. *Barber*, the Court, acting on what they considered to be the intention, did not construe what the testator had said, but they interpolated a devise such as they thought necessary for the purpose of executing that intention. The intention which they ascribed to him was, not to leave after-born children unpro-

vided for. But suppose such an intention to be ever so clearly evinced, suppose a recital in the will of such intention, yet if there be no apt words used to provide for this, the answer will be *quod voluit non dixit.* Even if a testator had recited at the end of his will that he had provided for all his children, still, unless there were some words which could be construed to provide for them, the Court could not give effect to his intention. The case of *White* v. *Barber* proceeded on erroneous principles, and it has little judicial authority in support of it. It is assumed, that the testator expected immediate death, and that he had provided in the expectation of that event only. It follows, then, that however improbable it was that the testator should intend to give to a posthumous child only, there could be no pretence for supposing that he intended to provide for children born in his lifetime, for the instrument which he executed he expected would be called into operation only in the event of his so dying that he could leave no child but a posthumous one; so that there is no kind of presumption that he intended by the will to provide for a child after born which was not a posthumous child. On the contrary, it is clear that he did not entertain any such intention. The circumstances under which the will was made, so far from showing an intention to provide for all children, including posthumous and not posthumous, negative such intention. It is true that it does not show that the testator preferred posthumous children to children not posthumous, but it shows that there was no intention on his part, by this instrument, to provide for any but posthumous children. It is not impossible that the party drawing the will for him might have said to him, "Suppose you have a child in your lifetime;" and the testator might have answered, "If so, I can make a new will; at present I am providing for what is going to happen, my immediate death. I therefore make provision applicable to that state of things only." The testator leaves, in clear and unambiguous terms, whether he survives or not, the estate to his nephew, and there is nothing which takes it away from him. I clearly consider, that, in deciding in favor of the nephew, the Court does not decide that the testator's family is provided for in the same manner as it would have been by the testator if the question had now been put to him, but that the Court gives to the only instrument which shows what was the intention of the testator the only operation

which the testator intended that it should have, however otherwise he might have intended to have provided under a different state of facts.

Cresswell, J. — I thought the case of *White* v. *Barber* was an authority for the defendants, and I acted on it at Nisi Prius; but sitting here I am not bound by that decision, and I think that case is not law. A distinction may be taken, in one sense, between that case and the present one, that there it did not take away an estate previously given, but conferred an estate, whilst here it takes away the estate given to the nephew. But, however, the same question is to be disposed of under the present case as under that of *White* v. *Barber*, and the distinction, therefore, is immaterial. The question is, what effect the testator intended should be given to his will, and are the words used sufficient to accomplish it? Now, for the defendants to support the nonsuit, it must be argued, that by this instrument the testator intended, on any child being born in his lifetime, to take away the estate previously given to the nephew; but the circumstances show that he did not contemplate a child being born in his lifetime; had he thought of such, he might have made a very different will. And even if he were to imagine that the testator did intend to provide for all his children, I cannot say that the words used are sufficient to accomplish it. The rule, therefore, must be made absolute to enter a verdict for the plaintiff.

Williams, J. — I am of the same opinion. The will gives, in clear terms, an estate to the nephew, and the testator contemplates one event, and one event only, on which that estate is to be taken away from the nephew — namely, the testator dying leaving his wife enceinte. That event has not happened, and therefore the devise to the nephew must take effect. — *Rule absolute to enter a verdict for the plaintiff.*

Sittings in Banc after Hilary Term. — January 27, and February 28, 1851.

Grant *et al.* v. Norway *et al.*

The master of a ship has no general authority, as such, to sign a bill of lading for goods which are not put on board the vessel; and consequently the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on board.

THIS was an action on the case by the indorsers of a bill of lading signed by the master without receiving the goods on board, against the owners. The facts can be gathered from the opinion of the Court. The counsel for the plaintiffs cited the following authorities:—Story on Principal and Agent, ss. 116, 119, 127; *Howard* v. *Tucker*, (1 B. & Ad. 712); *Ewbank* v. *Nutting*, (7 C. B. 797); *Jenkins* v. *Usborne*, (7 M. & G. 699); *Thompson* v. *Dominy*, (14 M. & W. 403); *Prescott* v. *Flinn*, (9 Bing. 19); *Alexander* v. *Mackenzie*, (6 C. B. 766); *Llewellyn* v. *Winckworth*, (13 M. & W. 598); *Pickering* v. *Busk*, (15 East, 38); and *Trueman* v. *Loder*, (11 Ad. & El. 589); *Berkeley* v. *Watling*, (7 Ad. & El. 29); *Cornfoot* v. *Fowkes*, (6 M. & W. 358); *Lickbarrow* v. *Mason*, (2 T. R. 75); and Story on Principal and Agent, ss. 318, 456.

Cur. adv. vult.

JERVIS, C. J., now delivered the following judgment:—This case was argued before my Brothers Cresswell, Williams, and myself; it arises on a special verdict, and presents a question of considerable importance, both to those who take bills of lading on the faith of their representing property which passes by the transfer of them, and to the shipowner, who is attempted to be bound by all bills of lading that a captain may think proper to sign. The point presented by the several pleas is substantially one and the same, namely, whether the master of a ship, signing a bill of lading for goods which have never been shipped, is to be considered as the agent of the owner in that behalf, so as to make the latter responsible. The authority of the master of a ship is large, and extends to all acts that are usual and necessary for the use and management of the vessel, but it is subject to several well known limitations. He may make contracts for the hire of the ship for carrying, or he may vary that which the owner has made: he may take up monies in foreign ports, and, under certain circumstances, at home, for necessary disbursements for repair, and bind the owners for repayment, but his authority is limited by the necessity of the case, and he cannot make them responsible for money not actually necessary for those purposes, although he may contend that it is. He may make contracts to carry goods on freight, but cannot bind the owner to carry freight free. So, with regard to goods put on board, he may sign the bill of lading, and acknowledge the nature, quality, and condition of the goods. Constant

usage shows that the master has a general authority; and if a more limited authority is given, the party not informed of it is not affected by such limitation. The master is a general agent to perform all things relating to the usual employment of his ship, and his authority, as such agent, to perform all such things as are necessary in the line of business in which he is employed, cannot be limited by any private orders not known to the party in any way dealing with him. This general proposition is laid down by Mr. Smith in his Mercantile Law, p. 559. Is it, then, usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? All parties concerned have a right to assume that the agent has authority to do all that is necessary; but the very nature of the bill of lading shows that it ought not to be signed till the goods are on board, for it begins by describing them as "shipped." Indeed, it was not contended that such a general authority was usual. In *Lickbarrow* v. *Mason*, (2 T. R. 77), Buller, J., says, "A bill of lading is an acknowledgment by the captain of having received the goods on board his ship; therefore it would be a fraud in the captain to sign such a bill of lading if he had not received goods on board, and the consignee would be entitled to his action against the captain for the fraud." It is not contended, in this case, that the captain had any real authority to sign the bill of lading unless the goods had been shipped; nor can we discover any ground on which a party, taking a bill of lading by indorsement, could be justified in assuming he had authority to sign such bill, whether the goods were put on board or not. If, then, from usage and the general practice of shipmasters, it is generally known that the master derives no such authority from his position as master, the case must be considered as if the party taking the bill of lading had notice of the express limitation of authority, and in that case undoubtedly he could not claim to bind the owner by the bill of lading signed, when the goods therein mentioned were not on board. It resembles the case of goods or monies taken up by the master on the pretence that they were wanted for the ship, when in fact they were not; or a bill of exchange accepted or indorsed by procuration, when no such agency existed. *Alexander* v. *Mackenzie* (6 C. B. 767) shows that the words "by procuration" would give notice to all parties that the agent is acting with a special and limited authority; and, therefore,

the party taking such a bill has to establish by evidence the authority. It is not enough, for that purpose, to show that other bills, similarly accepted and indorsed, have been paid, although such evidence, if the acceptance was general by the agent in the name of the principal, would be evidence of a general authority to accept in the name of the principal. So, here, the general usage gives notice to all people, that the authority of the captain to give bills of lading is limited to such goods as have been put on board; and the party taking the bill of lading, either originally or by indorsement of the goods, which have never been put on board, is bound to show some particular authority to the master to sign the bill in that form. There is very little to be found in the books on this subject; it was discussed in the case of *Berkeley* v. *Watling*, (7 Ad. & El. 29), but that case was decided on another point, although Littledale, J., said, in his opinion the bill of lading was not conclusive, under similar circumstances, on the ship-owner. For these reasons, we are of opinion that the issue should be entered for the defendants, and that the defendants are entitled to the judgment of the Court.

Court of Exchequer.—Michaelmas Term, Nov. 8, 1850.

SKINNER *v.* THE LONDON, BRIGHTON, AND SOUTH-COAST RAILWAY COMPANY.

A declaration against a railway company alleged that the plaintiff, at the request of the defendants, became a passenger for hire in one of their trains, for reasonable reward to the defendants in that behalf; and that in consequence of the carelessness, negligence, and want of skill of the defendants and their servants, the train ran against another train on the line, whereby the plaintiff was injured. The defendants pleaded the general issue, with a traverse of the plaintiff being a passenger, &c. At the trial it appeared that the train in question was hired of the company by a society for an excursion, the tickets for which were sold and distributed by the secretary of the latter body, from whom the plaintiff purchased his, and that the accident was occasioned by the train running, in the dark, against another train which was standing still at an intermediate station on the line: — *Held*,

First, that the mere fact of the accident, having occurred, was *primâ facie* evidence of negligence on the part of the defendants; and,

Secondly, that there was evidence to go to the jury in support of the allegation that the plaintiff became a passenger for hire with the company.

THIS was an action for negligence. The declaration stated that the plaintiff, at the request of the defendants, became and was a passenger in one of their carriages, being one of a train of carriages of the defendants, drawn by a

locomotive engine of the defendants, to be by them safely and securely carried and conveyed from Brighton to London, for reasonable reward to the defendants in that behalf, and the defendants then received the plaintiff as such passenger as aforesaid, and thereupon it then became and was the duty of the defendants to use due and proper care and skill in and about the carrying and conveying the plaintiff on the said journey. It then proceeded to aver that they did not use due or proper care or skill, &c., in consequence of which, and by and through the mere carelessness, negligence, and improper conduct of the defendants and their servants in that behalf, the train of carriages in which the plaintiff was such passenger as aforesaid, and the locomotive engine then drawing the same, &c., ran and struck against a certain other train of carriages then being in and upon the said railway, whereby the plaintiff was injured, &c. The defendants pleaded the general issue, with a traverse of the plaintiff being such passenger, &c. At the trial before the Lord Chief Baron, it appeared that, on the occasion in question, a body called "The Printers' Pension Society," had hired a train of the company for the purpose of making an excursion from London to Brighton and back. The tickets for the excursion were sold and distributed by the treasurer of the society, from whom the plaintiff purchased one. On the return from Brighton to London, the train, it being then dark, ran into another train which was standing still at an intermediate station on the line of railway, and thus caused the accident complained of. On this evidence the Attorney-General for the defendants objected that there was no evidence of the plaintiff being a passenger for hire with the company; but the judge overruled the objection, reserving leave to move to enter a nonsuit on the point. The case then proceeded, and the judge directed the jury, that the fact of the accident having occurred, was *primâ facie* evidence of negligence to fix the defendants. *Carpue* v. *The London and Brighton Railway Company* (5 Q. B. 747; 8 Jur. 464) was referred to. The jury having found for the plaintiff.

Bramwell now moved for a new trial, on the ground of misdirection; and also on the point reserved.— First, the judge at *Nisi Prius* put the *onus probandi* on the wrong party. The plaintiff complaining of negligence on the part of the company, it lay on him to show the nature of that negligence, instead of which he confined himself to

proof of the accident. [POLLOCK, C. B. — If A. tumbles against B., *primâ facie* he is responsible; but if it were proved that he did so in consequence of a fit of apoplexy, he would not be responsible. So here there is a collision between two trains of this company, that is *primâ facie* some evidence of negligence on their part.] The fact was, (although this was not proved at the trial,) that no skill could have prevented the accident, as the train standing at the station was inevitably kept there by a luggage train before it which had broken down. [ALDERSON, B. — Was it not negligence to run the trains so close?] There was no evidence to show at what intervals they ran. [ALDERSON, B. — This is not the case of two vehicles belonging to different persons, running against each other, where no negligence can be inferred against either party, in the absence of evidence as to which of them was to blame. But here all three trains belong to one company, and whether the accident arose from the trains running at too short intervals, or from the mismanagement by their servants, of any of those trains, or of their officers at the station, in not sending to stop the train that was coming on, they are equally liable. It was not necessary for the plaintiff to trace more specifically where the negligence lay; and if the accident arose from some inevitable fatality, it lay on the company to show it.] Secondly, the allegation in the declaration that the plaintiff, at the request of the defendants, became a passenger in their train, for reasonable reward being traversed, the plaintiff was bound to prove a contract with the company to that effect. Now that was not only not established, but was negatived by the evidence, which shows that his contract was made with the Printers' Pension Society. [PLATT, B. — Do you contend that the treasurer of that society was the proper person to sue the company?] Perhaps he might have sued them: but at all events the plaintiff should have described the contract as it really was. [ALDERSON, B. — The company, by giving their tickets to the treasurer of the society to distribute, constitute him their agent to contract with those who take the tickets.]

THE COURT then said they thought there was evidence for the jury on both points, and therefore the rule must be refused.

Abstracts of Recent American Decisions.

Supreme Court of New York, General Term, March, 1851.

Before Chief Justice EDMONDS, and Judges EDWARDS, MITCHELL, and KING.

Administrator — who may not be. A professed gambler who pursues gambling for a livelihood, is not, though it appears that he has been successful, a fit person to be appointed an administrator. Decree of surrogate reversed. — *McMahon* v. *Harrison.*

Bond — Assignment — Guaranty — Consideration. When at the same time that a party executes an assignment of a bond, he executes a separate paper, guaranteeing the payment of the bond, but without expressing any consideration for the guaranty, the assignment and guaranty are regarded as one instrument, and the consideration of the one answers for and affects both. — *Hanford* v. *Rogers*

Deed of feme covert — Proof. Where the deed of a wife is good, without a separate acknowledgment, her execution of it may be proved, by proving the handwriting of the witnesses who are dead, without proving also that she executed it voluntarily and without compulsion from her husband. — *Vanwinkle* v. *Constantine.*

Error — Non-suit. When there is no dispute about facts, and from those facts it appears that the plaintiff is not entitled to recover as matter of law, it is error for the judge who tries the cause to refuse a non-suit, and to submit the question to the jury. — *Carpenter* v. *Smith.*

Guardian and Ward. When a guardian without obtaining permission of the court expends his own money in improving his ward's property, he cannot recover such expenditure of his ward on his coming of age; his recovery in such case being limited to such expenditures as were necessary to his ward, according to his circumstances and situation in life. — *Hassard* v. *Rowe.*

Insurance—Expiration of time policy. A time policy on a vessel does not extend to bringing her into port, though she be on a voyage when the time expires, and the policy contains the usual printed clause "and so shall continue and endure until the said vessel be safely arrived at —— as aforesaid, and until she shall be moored twenty-four hours in good safety;" such printed clause being controlled by the written clauses which most surely show the intention. — *Mechanics Fire Ins. Co* v. *Leeds.*

Lien. Where the owner of lots agrees with a mechanic for the erection of houses on those lots, on the condition that the owner will advance the builder a certain sum on each house, and when finished will convey the houses and lots to the builder, taking back a mortgage for the price of the lots and the amount so advanced, that is a contract for the erection of buildings within the lien law. — *McDermott* v. *Palmer.*

Lien — Waiver. Where goods had been left as security for a debt, and the debtor had demanded the goods, without offering to pay the debt, and on such demand the creditor had set up title in himself by denying that he had any goods belonging to the debtor, and did not set up his lien. *Held*, that the lien was waived. — *Gillespie* v. *De Bouvier.*

Payment — Priority. Where there are several accounts between the parties, and payments are made and not specifically appropriated by either party to any particular claim, they go in payment of debts in the order of time. — *Meyer* v. *Dows.*

Principal and Agent — Liability of Principal. Where an agent is di-

rected to contract for his principal for the sale and delivery of goods, the agent may make the contract in his own name, if such is the custom of the trade, and thereby the principal's object can be attained, and the agent making the contract in his own name, does not discharge the principal's liability to him. In such case the principal is bound to make good to his agent in an action for money paid, the amount of expense he may have incurred in executing the order. — *Stimpson* v. *Beals.*

Promissory Note. An undertaking promising to pay certain persons (naming them) as "trustees" as an incorporate association or their successors in office is not a promissory note, it being uncertain to whom it is payable. — *Garr* v. *Davis.*

Statute of Frauds — Seal — Consideration. A sealed instrument under the statute of frauds, imports a consideration, and where in an agreement to pay the debt of another, it imports to be, in consideration of one dollar, it is not necessary that that sum should have been paid; it is enough that there is a liability to pay it which can be enforced by the statute of frauds. — *Childs* v. *Barnum.*

Surrogate — Application to sell lands — Parties. On an application to the Surrogate for an order to sell lands of a deceased person to pay debts, and on an appeal to this court, on his order in that respect, the heirs of the deceased, as well as his personal representatives, are proper and necessary parties. The motion to dismiss the appeal granted unless the appellant, within twenty days, institute the proper proceedings to make the heirs parties. — *Suffern* v. *Lawrence.*

Supreme Court of Massachusetts, Suffolk, March Term, 1851.

Agreement — Ambiguity — Parol Evidence. Assumpsit on the following paper: "Mrs. D. to Ball & Co., Dr. Aug. 20, 1847. To inserting one upper set and part of lower set of teeth on gold plate, warranted for one year; and if, on trial, they cannot be made useful, the teeth to be returned, and the money refunded. Whole called $110. Rec'd payment. Ball & Co." *Held*, that the writing was a contract; that parol evidence as to the price of the teeth, or of conversations or agreements prior to the written contract, which was the best evidence of the intentions of the parties, was inadmissible, there being no ambiguity in the contract, latent or patent, as the words "made useful" clearly related to the person who was to use them. — *Davis et ux.* v. *Ball.*

Charter Party — Freight — Demurrage. Assumpsit on a charter party. The Brig Pandora sailed under a charter party in the usual form for a voyage from Boston to Wilmington, N. C., thence to Cape Haytien, and thence to Boston — $1500 was to be paid for the charter party, as much in Hayti as the master wanted for disbursements of the vessel, and the balance on the discharge of the cargo in Boston. $107 were advanced to the master in Cape Haytien. The captain was to have what freight could be got from Boston to Wilmington. The vessel was delayed in Cape Haytien, in consequence of a quarantine, for thirteen days beyond the lay days allowed by the charter party. The vessel was totally lost on the return voyage to Boston. The action was for freight from Wilmington to Cape Haytien, and for the thirteen days' demurrage. *Held*, that words of the charter party expressly defined one voyage for the gross sum of $1500 — that it was not affected by the payment to the master in Cape Haytien, and that consequently no freight was earned. Otherwise — had the charter party described two voyages, as in *Brown* v. *Hunt*, 11 Mass. 45; and in *Locke* v. *Swan*,

13 Mass 76. *Held*, also, that as the delay was without the fault of the defendants, no demurrage could be claimed. — *Towle* v. *Kettelle et al*

Court Records — Amendments thereof — Writ of Entry. Demandant's wife claimed the estate under the will of Tilley, and as the heir of Tilley's children, deceased. The tenant claimed under a deed by the executor of Tilley, of the premises, which were sold at public auction, pursuant to a license therefor, as appeared by the record of the Court, offered in evidence. The order to sell was passed in 1824; but the record of the order was not made up and entered until 1838, when a new clerk was in office, when it was done, on petition of one Vinal, a party not interested in the premises, and by leave of the Court. *Held*, that the Court had the right to judge of the form and sufficiency of its records, and could at any time correct any mistake therein — *nunc pro tunc* — and cause the same to conform to the facts of the case. *Held*, also, that on the petition of Vinal no notice was necessary, as the making up of the record is the act of the Court itself. — *Balch* v. *Shaw.*

Equity — Devise — Construction. Interpleader by executors against the legatees and heirs at law of Ephraim Marsh, to settle their conflicting claims. Marsh died in 1847, having devised to his executors and their heirs, certain real estate, in trust, to pay over the net rents and income to his son, during life, and on his decease to convey the same, in fee, or if a power of sale given to them had been exercised, to pay over the proceeds thereof to the children of the son, or if he died without leaving children, to the testator's heirs at law. There were also legacies to the amount of $15,400. The son died in 1849 without issue. The personal estate was insufficient for the payment of the legacies. *Held*, that the clause in the will was not to be construed as a specific devise to the heirs at law; that under the conveyance directed by the will the heirs would take, as if no will had been made; that the trustees would hold the legal estate only to convey the fee to the heirs at law — and that so much of the real estate as was necessary must be sold to pay the legacies. Authorities referred to by the Court: *Hubbell* v. *Hubbell*, 9 Pick. 561; *Parsons* v. *Winslow*, 6 Mass. 169. — *Ellis* v. *Page.*

Insolvent Law — What debts are provable. Appeal by the assignee of Green & Co., insolvent debtors, from the allowance of certain claims by the master. Green & Co. had become liable, partly as drawers and partly as indorsers of bills of exchange on, and accepted by a house in London. After acceptance, but before maturity, this house made a composition with the holders of the bills, who agreed to accept a portion of their claim, a small part in advance, the rest by instalments, and to release the London house. The deed of composition and release contained a proviso, reserving to the creditors the right to recur to all other parties liable in any capacity. *Held*, that the reservation in the composition deed was valid, and the claims were rightly permitted to be proved by the master. *Held*, also, that the whole debt should be proved, except where it was known to the Court that something had been paid, in which cases the payment must be considered *pro tanto*, and the balance only proved. The authorities referred to by the Court were *American Bank* v. *Baker*, 4 Met. 164; *Ex parte Glendenning*, Buck's Bankruptcy Cases, 517; *Ex parte Gifford*, 6 Ves. 805; *Nicholson* v. *Revill*, 3 Ad. & Ellis, 675; *Kearsly* v. *Cole*, 16 M. & W. 128; Stephens, N. P. 936; Montague on Composition, 37; Chitty on Bills, 412. — *Sohier, assignee, appellant in re Green & Co.*

Insurance of Mortgaged Property — Mortgagee's Rights. Assumpsit on a policy of insurance. The plaintiff, as mortgagee insured his interest in the destroyed premises, in his own name, and paid the premiums. The defendant corporation admitted the loss, and was ready to pay it upon the

plaintiff's assigning to it his interest in the mortgaged premises — which he refused to do. *Held*, that as there was no privity between the company and the mortgagor — and as the mortgagee had insured the property for himself and in his own name, he had a right to the whole sum insured, without assigning or relinquishing the debt secured by the mortgage. — *King* v. *State Mutual Fire Ins. Co.*

Insurance — Policy — Parol Evidence. Assumpsit by assignees of the assured on a policy of insurance of $2600 on plaintiff's property, — on which there was a prior insurance which was not noted in the policy in question. By the by-laws of the defendant corporation, all policies on property previously insured were to be void, unless the same were expressed in its policies, which by-laws were annexed to and made part of the contract of insurance. The plaintiff offered to prove by parol that the defendants knew of the prior policy and assented thereto before execution and delivery of the policy in suit; — that the assured supposed the prior policy was properly noted, and did not know to the contrary until after the loss, and that he did not read the policy at any time before the loss. *Held*, that the evidence was inadmissible, as the words of the policy were unambiguous — and that as to the fraud alleged on the part of defendants, the assured had time to read the policy, and was culpably negligent in not doing so. Besides, if there were fraud, the remedy was in equity. The assured could not recover on the policy, and the assignees stood in his place. — *Barrett et al.* v. *Union Mutual Fire Ins. Co.*

Landlord and Tenant — Notice to quit. Writ of entry, to recover possession of a house in Boston and mesne profits of rent. May 28, 1844, demandant leased the premises to the tenant for five years from July 1, 1844, at $1400 per annum — agreeing to take the rent in board for himself and family. There was a provision in the lease that either party might terminate the tenancy by giving six months' notice in writing. July 6, 1847, demandant gave this notice to leave in six months from that date. The tenant refused to quit, and notified the demandant that she was ready to furnish him with board for the rent, according to the terms of the lease. *Held*, that the provisions of law and the covenants in the lease limited the power to terminate the tenancy, and that it was not to be construed as an arbitrary power which the landlord could exercise without regard to its consequences. By the lease a tenancy for four years was created, at a fixed annual rent, and the only mode of doing justice between the parties was to give the one his annual rent and the other the occupation of the house for a full year. The use of the house for the first part of the year might be of little value to the tenant, and the last part the only valuable portion, and therefore it would not be proper for the landlord to receive his half year's rent for that portion of the year which was valueless to the tenant. The courts of England had always been guided by this principle in similar cases, and the law now could not be questioned, and although this was the first case in which the question had been raised in this country, the court had no hesitation in adopting the rule, that unless it was expressly provided in a lease that it could be terminated at any time, it must be held that it should only terminate with some year of the tenancy. — *Baker* v. *Adams.*

Practice — Evidence — Admissions — Assumpsit. The writ originally contained the money counts, and an account annexed. After entry of the writ, plaintiff obtained leave to file an amended declaration, setting forth a judgment and execution obtained in violation of a contract by the defendant, against the plaintiff, which the plaintiff had been compelled to pay. *Held*, that, as the amended count set forth the same subject-matter and transactions, it was not for a different cause of action, and was properly allowed. *Held*, also, that the *admissions* of the defendant were competent

evidence to show the existence of the judgment and execution, and thereby to prove the breach of the contract. Authorities referred to by the Court: *Ball* v. *Claflin*, 5 Pick. 303; *Swan* v. *Nesmith*, 7 Pick. 220; *Sheldon* v. *Frink*, 12 Pick. 568; *Slatterie* v. *Poole*, 6 M. & W. 664, 1 Greenl. Ev. § 96, 97. — *Smith* v. *Palmer*.

Promissory Note — Assignment — Statute of Limitations. Assumpsit on an attested promissory note, dated January 1, 1835, and payable, on demand, to plaintiffs or order. The defendant pleaded the statute of limitations, and showed that the plaintiffs became insolvent in 1842; that this note, with others, passed to the assignee, and was sold at auction and bid off by Drury. The note was not indorsed, but was transferred by delivery only. *Held*, that, as the assignee had no interest in the note, the action was correctly brought in the name of the original payees; that it was doubtful whether an action could be maintained at all in the name of the assignee; that, if plaintiff purchased the note on his own account, he might perhaps be reinstated in his original position, and if so, defendant had no right to object. *Held*, also, that the note in question was within the terms of Chap. 120, § 4, of the Rev. Stat., and that the statute of limitations was no bar to the action. *Hodges* v. *Holland*, 17 Pick. 13; *Sigourney, Admin.* v. *Savoy*, an unreported case from Worcester county, were referred to by the Court. — *Drury et al* v. *Vannevar*.

Promissory Note — Joint Promissor — Indorser. Assumpsit on a negotiable promissory note by plaintiff as indorser. One Lyon signed the note as maker; and, to give the note strength, the defendant put his name on the back thereof before it was delivered to the payee, who subsequently passed it to the plaintiff. *Held*, that the defendant was liable as an original promissor. *Hunt* v. *Adams*, 6 Mass. 519; *Sampson* v. *Thornton*, 3 Met. 275; *Union Bank, &c.* v. *Willis*, 5 Met. 504. The note was dated in Boston, and made payable to the New England Steam and Gas-Pipe Company. In reality, there was no such company at that time in existence; but one Derby, in good faith, carried on the business on his sole account, in the name of the corporation. *Held*, that it was a note to Derby, in the name of the New England Steam and Gas-Pipe Company; that he could properly pass the note to the plaintiff, who could rightly maintain an action thereon. Had Derby intended fraud, it would alter the case. 10 Barn. & Cressw. 558. — *Bryant* v. *Eastman*.

Taxes — Excess of Taxation — Abatement. Assumpsit to recover money paid for taxes under protest. The plaintiff was a resident of Boston, and rightly taxed on personal property, and on certain real estate, but was alleged to be improperly taxed on certain other real estate, to which he had not the title. *Held*, that personal property and real estate were distinct substantive subjects of taxation; that if a man owned real estate, and no personal property, or *vice versa*, but was taxed for both, he could recover the excess in this form of action; but that, if he owned some real estate, or some personal estate, and was taxed too high on such real estate, or on such personal estate, whether the excess was caused by over valuation, or by including property not belonging to him, the only remedy was by an application for an abatement pursuant to the statute. — *Howe* v. *Boston*.

Miscellaneous Intelligence.

Law Reform in England. — The Association known in England as the Society for Promoting the Amendment of the Law, appointed a special Com-

mittee on Law and Equity Procedure, to whom it was referred "to inquire whether the principles of Law and Equity can be administered in the same Court and by the same form of procedure; and in making such inquiry, to have regard to the provisions and operation of the New York Code." This Committee have made their first Report, which has been furnished us by David Dudley Field, Esq., and which, from its ability and the interest that attaches to the subject, we give entire.

"In pursuing the very difficult investigation intrusted to them, the Committee propose to consider, first, the causes and nature of the distinction between Law and Equity; next, the practical advantages and disadvantages which flow from that distinction; and, lastly, the practicability and expedience of adopting some plan whereby that distinction can be safely abolished.

And first, — as to the causes and nature of the distinction between Law and Equity. The Common Law of England is the work of a rude age, more anxious to protect the rights of the citizen from being overborne by the power of the barons, or undermined by the corruption of the judges, than to ascertain those rights clearly, or to enforce them completely. Hence the Common Law has ever looked with jealousy on the transfer, and indeed on the existence of rights not accompanied by possession; it has sought, by means of trial by jury, to place the administration of the law in the hands of the people themselves, and it has fettered judicial discretion, by enforcing technical rules incapable of expansion, and by prescribing a strict and unvarying judgment. As society advanced, such a state of things naturally produced much injustice. Many rights arose which the Courts of Law either totally ignored, or only partially recognized; and at length, towards the end of the fourteenth century, the evils arising from this illiberal system had reached such a pitch, that the clerical chancellors, after the example of the prætors at Rome, assumed a jurisdiction, in cases of peculiar hardship, to mitigate the severity, to supply the defects, and to extend the remedies of the Common Law. The principles upon which the Chancellor proceeded were drawn in part from the Civil Law, and in part from abstract morality and justice; and he asserted his jurisdiction, not by interfering directly with the proceedings or judgments of the Courts of Common Law, which would have provoked a dangerous, and probably a successful resistance, but by personal influence exerted upon the litigants, whom he compelled, by the threat of punishment, to do whatever appeared to him upon the special circumstances of the individual case to be just, without reference to the maxims or the decisions of the Courts of Law. Thus did the ultimate power over property pass in a great measure from the Courts of Law, and thus was the duty of the Legislature of adapting our jurisprudence to the emergencies of society as they arise virtually transferred to a Court of Equity. So long as this state of things continued, a division of the Courts of Law and Equity seems to have been absolutely necessary, for a fusion of them would have been nothing less than a complete abrogation of the law, and the substitution for it of the arbitrary discretion of a judge. And it is in this sense, and with reference to this system, that the Committee understand and acquiesce in the justice of the celebrated opinion of Lord Bacon: — "Omnino placet curiarum separatio; neque enim servabitur distinctio casuum si fiat commixtio jurisdictionum, sed arbitrium legem trahet."

At the present day this "arbitrium" prevails no more in Equity than at Law. Precedent has superseded discretion — justice is no longer capable of being moulded in Chancery with a view to relieving each individual wrong; for it has long been considered, and rightly considered, that any system of law thus administered, varying, as it must do, with the opinions of each successive judge, is little better than absolute tyranny; and the decrees of the Chancellor, equally with the judgments of the Common Law Judges, are now founded on general rules, the offspring of former decisions, and applicable alike to entire classes of cases. Indeed Equity for more than a

century past has become a system as fixed, as defined, and as incapable of further expansion, as the Common Law itself, against whose narrow principles it relieves. We have thus two systems of jurisprudence, of different origin, and employing different methods of procedure; the principle of the one being to mitigate, correct, and assist the other, though it no longer possesses that flexibility and power of individualizing its relief, which such an office would seem to require.

From this brief outline, it is clear that the distinction between Law and Equity arose, not from any recognition of its abstract propriety, but because the Courts of Law and the Legislature had alike omitted to give to the system of Common Law that expansion which the advance of civilization imperatively required; and it is equally clear that, by the substitution of precedent for discretion, of general rules for specific remedies, the nature of equitable jurisdiction has been entirely changed from what it originally was in early times. If, then, these two jurisdictions have succeeded in working together for the promotion of substantial justice, this result must be attributed, not to calculation or design, but to a fortunate accident.

Of the Advantages of the Division. We now pass on to the consideration of the practical advantages arising, or supposed to arise, from this division of jurisdictions. These are only two: 1st, the power to preserve intact the ancient forms of our Common Law; and, 2dly, the superior skill attainable respectively by the judges and the practitioners in Courts of Law and Equity in consequence of the division of labor. The first argument, although supported by the authority of Lord Redesdale, can scarcely require consideration at a time when the forms of actions at Law have been found to work so much injustice, that it is proposed, with almost universal consent, to modify extensively, if not entirely to abolish them.

With respect to the division of labor, more may be said; but even here, as Equity is co-relative and co-extensive with Law, those who practise the one must of course be extensively acquainted with the other; and, therefore, under the present system, that superior accuracy which arises from concentrating the powers of the mind on a single subject is but imperfectly attained. No doubt, so long as the respective systems of Law and Equity are worked through the medium of totally different rules of procedure, there is an advantage in confining the attention of the lawyer to one of them only. But, with the abolition of this difference, the advantage would be lost. It must be observed, also, that it would still be open to every lawyer to select that branch of substantive law in which he considered himself to excel, and the division of labor would obviously be much facilitated by the adoption of one uniform system of procedure.

Even under the present system it is found impossible to carry out the division consistently. The Courts of Bankruptcy are by statute Courts of Law and Equity, nor could they administer the jurisdiction under any other constitution. From these Courts an appeal lies to one of the Vice-Chancellors, who is thus a judge both of Law and Equity. If we ascend higher, we find the highest Courts of Appeal — the House of Lords and Privy Council — recognizing no division of labor, but deciding all cases, legal and equitable. It is also worthy of remark, that among our best Chancellors are to be found the names of many celebrated Common lawyers, and among our best Common Law Judges have been some who have held a high position in Courts of Equity.

Of the Disadvantages of the Division. The principal disadvantages of the division of Law and Equity are the following: —

1st. The line which separates the two jurisdictions is so ill-defined, that, in many cases, a preliminary investigation of great nicety is required before it can be ascertained whether the remedy should be sought at Law or in Equity.

2d. In many cases a complete remedy cannot be had without having recourse to both Courts, and thus bringing two law suits instead of one.

3d. Courts of Law are compelled to decide without reference to equitable principles; and, consequently, to do injustice with a full knowledge of the fact, and an anticipation of the subsequent overthrow of their judgment by the interference of a Court of Equity.

4th. Courts of Law and Equity, in many instances, administer the same law; and thus a party is liable to be twice vexed for the same matter, and to have the judgment of a Court of Law in his favor rendered valueless by the adverse decision of the Chancellor on the same point.

5th. The existence of two distinct systems of pleading and practice, is of itself a great evil.

6th. Courts of Equity are compelled to decree that the parties themselves should carry their orders into effect, which occasions much endless trouble and expense.

The Committee proceed to consider each of these evils in their order.

1. *The Uncertainty of the Jurisdiction.* Of the uncertainty of the line which separates legal from equitable jurisdiction, the case *Mozley* v. *Alston*, 1 C. & J., affords a singular instance. In that case several shareholders of a company filed a bill against the directors, alleging their continuance in office to be illegal, and praying for an injunction. The defendants demurred, on the ground that the remedy was at Law: after seven days' argument, the Vice-Chancellor of England overruled the demurrer; thus establishing the right of the plaintiffs to sue in Equity. After five days' argument, the Chancellor reversed the judgment of the Vice-Chancellor, and allowed the demurrer; thus deciding that the plaintiff's remedy was at Law. After the enormous expense of these proceedings, nothing whatever was determined as to the rights, and the plaintiffs were left to commence their suit anew in a Court of Law, with a possibility of being met there with an argument that their remedy, if any, was in Equity.

This is not an evil of modern date, as appears by the case of *Humphreys* v. *Humphreys*, 3 P. Wms. 395. There the plaintiff filed a bill for payment of a bond. The defendant demurred, on the ground that the plaintiff's remedy was at Law, and the bill was dismissed. The plaintiff then sued at Law, and obtained judgment. The defendant next filed his bill in Equity to be relieved against this judgment, on the ground that the bond was without consideration, and the Court decided in his favor. Here, then, we have a Court of Equity first sending a plaintiff to Law, and, when the Court of Law had decided, setting aside its decision on a ground of which it was unable to take notice in the first instance.

2. *Incompleteness of Remedy.* In many cases Equity will not give relief until the plaintiff has established his right at law. Such are bills for partition, for the delivery up of title-deeds, for an injunction against a nuisance, and bills to establish a right. Can any reason be given why the Court which decides the right should not establish it, or why the Court which establishes it should not decide it?

Moreover, the practice of the Chancellor is to send cases on any difficult point of Law or question of construction for the opinion of a Court of Common Law. He, however, feels himself by no means bound to adopt this opinion, when he has obtained it, and, if dissatisfied, he will often direct a fresh case to be sent to another Court; thus throwing upon the suitor the expense of twice arguing a point before a tribunal which has no power to decide the question, and to whose opinion little weight will be attached by the Chancellor, unless it coincides with his own. Such a proceeding is very grievous to the suitor, and derogatory to the dignity of the Courts which are thus consulted. Courts of Equity also send issues of fact to be tried by juries. This is to the suitor the commencement of a new suit, for which his attorney has to prepare new briefs and to instruct fresh counsel. The Judge in Equity feels himself no more bound by the issue, than the case, and the verdict is often disregarded because the legal Judge did not draw attention to some point on which the equitable rights of the parties turned,

of which he was probably not apprised. In the case of *Morris* v. *Davies*, after three abortive trials at Law, the Lord Chancellor took the decision of the issue of fact upon himself; a course which, if adopted at first, would have saved the parties a ruinous expense, and in the result would have been at least equally satisfactory. To illustrate these complicated vexations, the Committee will briefly refer to the well known case of *Rigby* v. *The Great Western Railway Company*. The plaintiffs took a lease of the refreshment room at the Swindon station, from the company, on the undertaking by the company, that all trains, except, among others, trains to be sent express, should call at Swindon. The express trains did not call, and the plaintiffs filed a bill in Equity, praying for an injunction to compel them to do so. After a demurrer which was overruled, the Vice-Chancellor granted the injunction, which the Chancellor on appeal dissolved. The bill was retained, and the plaintiff was allowed to bring two actions at Law to try his right to an injunction. In these he succeeded; but a case was afterwards sent to a Court of Law, to obtain its opinion on a point to which the attention of the jury was not sufficiently called, with regard to the liability of the plaintiff to a person to whom he had made an underlease. After three arguments and judgments in Equity, two verdicts of juries, and one argument at Law, the suit remained still undecided.

The corresponding cases, in which a party to a suit at Law seeks assistance from Equity, are a bill of discovery, and a bill for an injunction. Neither of these can be granted without filing a bill, that is, without commencing a new suit in another Court, with fresh counsel and fresh pleadings. The result is, that these salutary powers are seldom honestly exercised, and that truth remains unexplored, and injury unchecked, from the inability of parties at Law to seek in a second suit that preventive and detective justice which they ought to have found in the first. But, although so little employed by the honest litigant, these expensive remedies offer irresistible temptations to those who are desirous of delaying or evading justice. The preventive powers of Equity are often put in motion by statements totally false, and the common injunction is obtained for want of an answer, which has, perhaps, been unavoidably delayed by tricky and perplexing interrogatories framed for that very purpose.

The recent case of *Tucker* v. *Robarts*, affords another striking instance of the necessity in certain events of instituting proceedings both in Equity and at Law, in order to obtain complete justice. There the Pelican Insurance Company had accepted a bill for 5,000*l*., payable at their bankers, Messrs. Robarts. The bill, on presentment, bore a false indorsement, but was nevertheless paid; and the question was, whether the company or the bankers should bear the loss. This being strictly a legal question, might at once have been settled in a Court of Law, but, unfortunately, one of the partners in Messrs. Robarts' house was also a director of the company, and, consequently, in any proceedings at law, he would have appeared in the double capacity of plaintiff and defendant. Hence it became necessary to call in the aid of the Court of Chancery. A suit was accordingly there instituted, and, after several years of needless and most costly litigation, that Court declined to interfere in the matter, excepting to this extent, that it ordered one of the parties to commence an action at Law against the other, and it prohibited both from raising any objection therein, on the ground of the same person being a member of both co-partnerships. The result was, that a litigation which could scarcely, under any other system, have continued for twelve months, was protracted for about as many years; and the costs incurred, instead of being calculated by tens and hundreds, were swelled into thousands of pounds.

3. *Antagonism of Jurisdictions.* The following table contains some of the principal instances of the conflict between the principles of Law and those of Equity: —

Owner at Law.	Owner in Equity.
Trustee.	Cestùi que trust.
Surviving partner.	Executor of deceased partner.
Assignor of chose in action.	Assignee.
Mortgagee.	Mortgagor subject to debt.
Executor.	Legatee.
Husband of wife's unsettled personalty.	Wife so as to have right to settlement.
Bargainor under bargain and sale not enrolled.	Bargainee.
Feoffor under Feoffment without livery.	Feoffee.

The following are some of the contracts which are valid at Law but invalid in Equity: — Bonds without consideration; bonds released by marriage; settlements differing from prior articles; contracts under surprise; contracts obtained by equitable fraud; part performed contracts within the Statute of Frauds; catching bargains with heirs or reversioners.

In all these conflicting cases enumerated above, Courts of Law are bound to give effect to the legal, and Courts of Equity to the equitable interest; so that, on the same state of facts, one person must succeed in one Court and another in the other. If the defendant's right be equitable, and the plaintiff sue at Law, the defendant must either submit to the decision of a Court which will not hear his defence, or incur the expense (if he be able) of transferring the cause to that Court in which his defence is available. Thus, a trustee may, by the assistance of a Court of Law perfectly aware of the fact, eject his *cestui que trust* from his own land; and a husband may obtain by the same means absolute power over the *choses in action* of his wife, out of which she is entitled to a settlement, and is even encouraged to to take this unjust step by the bribe of acquiring them for himself in case of survivorship.

With respect to the distinction between legal and equitable frauds, Lord Eldon, in *Feullager* v. *Clark*, 18 Ves. 483, remarks, that the Court will, as it ought in many cases, order an instrument to be delivered up as unduly obtained, which a jury would not be justified in impeaching by the rules of law, which require fraud to be proved, and are not satisfied though it be strongly presumed. Can any state of things be more unsatisfactory than that in one Court a judge should be bound to tell a jury that certain facts do not amount to a fraud, and that they must therefore give effect to the instrument; while in another Court another judge is equally bound to hold that the same facts do amount to fraud, to stay the proceedings of the other judge, and to require the instrument to be delivered up to be cancelled?

It is worthy of remark that these contradictory views of the same state of facts which are respectively taken by Courts of Law and Equity, often involve in confusion not merely the rights of the parties themselves, but those of third parties dealing with them. Thus the tenant of a mortgagor takes a lease subject to the infirmity of his landlord's title, and may be ejected at any time by a mortgagee of whom he has never heard, without the notice, and before the expiration of the term for which he has stipulated in the lease, and on the faith of which he has probably invested his capital. The same remark applies to the tenants of the *cestui que trust*, who have no recognized legal interest at all, and have only so far a questionable advantage over the tenants of the mortgagor, that they are able to seek a remedy in Equity.

4. *Concurrent Jurisdiction.* Not only do Courts of Law and Equity administer conflicting rules upon the same state of facts, but they also, in some instances, apply the same rules to the same state of facts. Though Courts of Law will not enforce equitable rights when declared upon, nor give them effect when pleaded, they will decide upon them when incidentally occurring. Thus they will decide on the equity of an unpaid vendor of

goods against the indorsee of a bill of lading, *in re Westzinthus*, 5 B. & Ad. 817; and on the validity of an equitable assignment of a debt, *Tibbits* v. *George*, 5 A. & E. 107.

That this state of the law in fact, if not in name, invests Courts of Equity with an appellate jurisdiction over Courts of Law appears from the case of *Burn* v. *Carvallo*, 4 Mylne & Craig, 690. That was an action between the assignee of a bankrupt and a creditor who had obtained certain goods of a bankrupt under what he contended was an equitable transfer. The Court of Queen's Bench, and afterwards the Exchequer Chamber, decided that the transfer was invalid, and the defendant was compelled to pay over to the assignee the value of the goods. Nothing daunted, he now filed his bill in Equity, and the Lord Chancellor decided that the transfer was valid, and compelled the plaintiff to refund the money which he had received under the judgment of the Exchequer Chamber. Had there been no divided jurisdiction, or had that division restricted each Court to its own department of Law, the parties would have been spared one of these two expensive lawsuits, and justice would have been saved the scandal of seeing the decisions of two Courts of Law overruled by a single Judge in Equity.

5. *The Existence of Two Codes of Procedure.* The multiplication of labor without any corresponding result is always to be deprecated. One of these systems must be superior to the other, or each must contain parts out of which a system superior to either may be constructed. The double system impedes the division of labor by limiting the practitioner to that Court with whose procedure he is conversant, and by substituting this artificial division for the natural division which would obviously obtain with reference to the subject-matter, instead of to the procedure of the suit.

6. *Imperfect Power of Decrees.* The peculiar nature of a Court of Equity which acts *in personam*, in order to avoid a conflict with the Courts of Law, renders it necessary to make the parties themselves the means of carrying out its decrees, and thus loads them with the expense of stamps and conveyances which they are compelled to pay and execute, and which are only required on account of the refusal of a Court of Law to notice a decree in Equity as conferring any title.

The Remedy. It remains to consider what remedy can be devised to meet these numerous and glaring evils. As they have all been shown to spring from the division of jurisdictions, it is manifest that the remedy is to be sought in their amalgamation. This may be done in three ways: — By adopting the equitable procedure; by adopting the legal procedure; by framing a new procedure.

Passing by the first proposition, which would imply the adoption of a precedure needlessly cumbrous and expensive, the Committee observe, that the second was the plan which was attempted by Lord Mansfield in the latter half of the last century, when he sought to take notice of equitable claims and defences in a Court of Law. The principal objection which was urged by Lord Kenyon and other opponents of this plan was, that Courts of Law being incapable of doing complete justice between the parties, ought not to interfere between them on equitable questions. If a legatee were permitted to sue the executor at law, a husband, it was contended, might obtain possession of a legacy without making a settlement on his wife. This was Lord Kenyon's favorite argument, and it was said to have had much influence in converting Mr. Justice Buller. But these learned Judges forgot that the anomaly existed already in the case of a debt due to the wife *dum sola*, which the husband might recover at law, without being forced by law to settle it on the wife; and indeed, the argument, if pushed to its full extent, would oust a Common Law Court of all its jurisdiction; because, in exercising it, it cannot do complete justice when collateral rights are involved. The main evil to be apprehended from allowing a Court of Common Law to notice equitable suits and defences, would be that, as Equity never recedes from a jurisdiction once assumed,

the concurrent jurisdiction, and consequently the power of contesting the decisions of Law in Equity, and making the latter virtually a Court of Appeal from the former, would be much increased. If, then, it be not advisable to keep up and extend the concurrent jurisdiction, could we abolish Courts of Equity and give their jurisdiction to Courts of Law? This question will be best answered by reference to the experience of Pennsylvania. In that State there is no Court of Equity, but the principles of Law and Equity are administered as one code, by Courts of Law, the legal principle, in cases of conflict, always yielding to the equitable. Thus, specific performance is enforced by finding large contingent damages to be released if the contract be performed; specific chattels are recovered in replevin, and equitable claims and defences are admitted in ejectment and assumpsit. But the Courts admit, that they have no means to enforce the maxim, that he who seeks equity must do equity; and they cannot deal with more than two interests in the same suit. It is the less necessary to dwell on the defects of this system, as it rests on the extension of the ancient forms of action which the Committee presume to be destined to great modification or to extinction. It will therefore suffice to observe, that the experience of Pennsylvania has clearly shown that Equity cannot be administered in Courts of Law without losing many of her most valuable qualities.

The third and only remaining course is to treat the principles of Law and Equity as a single code, and to administer that code by means of a new procedure, taking from each of the existing rules of pleading and practice whatever specific merit they respectively possess. This has been the attempt of the State of New York. The new code of procedure of that State has shown the possibility of such a reform, and suggested hints from which the Committee have no doubt that one uniform system of pleading and practice may be framed for all cases at Law and Equity. It is, therefore, the unanimous opinion of the Committee that, excepting the administration of the estates of deceased persons, which they think, in accordance with the Report of a former Committee, should be transferred to the Bankruptcy Courts; and excepting the Common Law jurisdiction of the Chancellor, and his jurisdiction as representative *parens patriæ*, the whole jurisdiction of Law and Equity ought to be vested in the same Court; that the distinction between the two should be abolished, the equitable principle in cases of conflict replacing the legal; and that this single code can and ought to be carried out under an uniform system of procedure. The Committee recommend to the Society the following resolutions: —

Resolved, with reference to the separate jurisdiction of Law and Equity, as recognized in this country: —

1. That justice, whether it relate to matters of Legal or Equitable cognizance, may advantageously be administered by the same tribunal.
2. That, where the principles of Law conflict with those of Equity, the latter shall prevail, to the exclusion of the former.
3. That all litigation, whether it relate to matters of legal or of equitable cognizance, may advantageously be subjected to the same form of procedure.
4. That the rules of procedure be embodied in a code.

The Webster Case in England. — The London Law Magazine for May contains, under the title of "A Murder Trial in America," its promised article on the Webster Case, as "so ably reported" by Mr. Bemis. The Webster case is assumed to be a fair specimen of the mode of administering criminal law in America, and occasion is taken to offer criticisms thereon — some favorable, some adverse, but all in a friendly spirit. The article on the whole is as just, and contains as few errors of fact as could be expected under the circumstances. The chief objection is made

to the great length of the trial; protracted, as it appears to the reviewer, unnecessarily, both in the amount of testimony offered by the government, and by the length of the Attorney General's argument; and that too, when "we have seldom read or heard of a case more divested of doubt, difficulty, or intricacy; or one which less justified the enormous redundance of matter with which it was belabored." The case doubtless wears this aspect to those who read the Report at this lapse of time, and after the confession; but those who bear in mind the task imposed on the government in the then divided state of the public mind upon the question of the prisoner's guilt, almost every one having, from the extraordinary nature of the crime, read the facts and formed an opinion thereon; recollecting, also, the acquittals which had been recently had in the same court-room, and feeling that at that time, more than any other for years, it was of the highest importance that the verdict should be according to the truth of the fact, — will either say that the government did nothing more than was necessary to convict, or will readily admit that if there was any error it was upon the right side. Those who know the difficulties with which the government had to contend, will smile at the charges of "enormous redundancy of matter," and of "overdone justice."

Some of the peculiarities of the administration of criminal law in America are thus referred to: "We find a peculiarity which is well worth our respectful consideration in England; namely, an inquiry of each juror whether he had expressed any opinion, or was sensible of any bias, or had conscientious scruples about conviction when the penalty was death? After the disgraceful acquittals for plainly proved murders so frequent of late in this country, owing to the same morbid feeling, it would be expedient to test our own jurymen similarly. A good deal of time lost, and justice defeated, might be averted were our jury boxes equally well weeded."

"There is another peculiarity of criminal trials in America, which told with great effect in the case, and might be adopted here with much benefit, namely, the payment by the State of the expense of witnesses for the *prisoner* in capital cases. The absence of them is used with just power against the prisoner where this is so. Here the expense to a poor prisoner of bringing them forward, is constantly urged falsely as a plea in his behalf, when guilty. When innocent, it is a cruel injustice that the prosecution should be empowered and the prisoner defenceless. This not unfrequently happens; our niggardly system thus works ill alike for the ends of justice, whether for the punishment of guilt or the defence of innocence."

"There is another beneficial example afforded by the American practice. The counsel for the prisoner speaks *after* instead of before calling his witnesses. This is a just system; the other an unjust one, for it is a needless disadvantage to make him forestall what his witnesses *may* say."

The comments of the reviewer upon the efforts of counsel, and the summing up of the Court, we give below. The praise bestowed upon the opening of Mr. Sohier, the argument of Judge Merrick, and the charge of the Judge, is fully deserved. An extended extract from Mr. Sohier's address is given, "as a fair specimen of the line of defence taken, and of the style and character of forensic eloquence in America." "The main defence having been thus based on an alibi, which, if true, wholly exculpated the prisoner, in the second day of his speech Mr. Merrick adopted a line of defence utterly inconsistent with it, and put it to the jury that he might have been guilty of manslaughter on sudden provocation. Perilous as this double defence always is, it was powerfully put," &c. "We wish we had space for much longer extracts from this very able speech, which occupied six hours and a half in the delivery; a period by no means unduly protracted after the mass of evidence with which the government had encumbered the case. Then came a concluding speech from the Attorney General on the whole case. He annihilated every vestige of the defence, and most ably and successfully demolished the hypotheses one after the other, viz. — that previous character was a sufficient defence; that some unknown agent committed

the crime; that the conduct of the prisoner was natural, usual, and inconsistent with guilt. The whole of the speeches were clever; parts of them powerful and eloquent, without one vestige of that rhetorical gewgaw and stage device which but too often alloy the best efforts of our bar. The peroration of the Attorney General is a proof of this, and affords an admirable example of a much needed lesson to juries, which our judges might with great benefit give in this country."

"The Chief Justice then summed up the case in a most able, terse and masterly speech delivered *standing* to the jury. He laid the case down most clearly and fully, and then recapitulated the evidence, without wading through it, as the fashion of some is. The following remarks on circumstantial evidence, and the natural and apt manner in which they are applied to the case, will illustrate and justify our commendation of this excellent charge."

"The proceedings which afterwards took place, on a writ of error, will form material of a second article, to which we must defer further and final comments on this singular specimen of American jurisprudence, — one signal no less for the great forensic talent and acumen it evinces, than for the operose and redundant complexity of its proceedings. So much overdone justice has never been exhibited, we will venture to say, before, in the history of jurisprudence."

Curiosities of Legislation. — The Louisville (Ky.) Journal contains the following paragraph: —

"It is said that the salary bill enacted, actually provides that the Governor shall have a yearly compensation of $10,000, each of the Judges of the Court of Appeals $6000, each of the Circuit Court Judges $5600, the Register of the land office $5000, the Secretary of State $3000, and other officers in about the same proportion. The bill originated in the House, and its phraseology runs substantially thus: The Governor shall have a salary of $2500, the Judges of the Court of Appeals $1500, Judges of the Circuit Court $1400, Register of the land office $1250, &c., *which sums shall be paid quarterly*. It is not provided that the officers in question shall have salaries of the said amounts *per annum* — the provision is expressly that they shall receive the specific salaries, *which sums shall be paid quarterly*. The language is specific, and the best lawyers at Frankfort say, as the best lawyers every where must say, that the law empowers each of the officers named to draw the whole sum specified every three months. And we understand that the able second auditor says, that, if they think proper to draw thus, he shall feel constrained by the plain letter of the law to pay them the money. Of course this is a very laughable and at the same time a very serious blunder, and the first thought of some may be that the next Legislature can and will at once correct it. This, however, is impossible. The new Constitution provides that no officer's salary shall be reduced during the period for which he is elected to office. So the Governor's legal salary must remain $10,000 a year during his entire term, the salary of each Judge of the Court of Appeals must remain $6000 a year for eight years, the salary of each Circuit Judge must remain $5600 a year for six years, &c., &c."

Railway Law. — We understand that a railway case of considerable importance has lately been heard before Chief Justice Shaw, at Chambers. The question arose between the Salem & Lowell Railroad Company, and the Essex Railroad Company, under a Bill in Equity by the former, praying for an injunction to restrain the latter road from removing any portion of its track, or erecting any depot building, or other structures across the same. The complainants were authorized by their charter to enter on and use the Essex railroad or any part thereof, and the Essex Railroad Company were about to erect a depot building across part of their track, connecting with the Eastern Railroad at Salem, to prevent the use of it by the complainants. A temporary injunction was granted at first, with leave to the respondents

to move to dissolve the same, and a further hearing being afterwards had, the injunction was continued. The Court considered that the policy of allowing one road to enter another was part of the established policy of the Commonwealth; and that, though it subjected the *servient* road to some inconveniences, the annoyances should be freely submitted to, as that was the only method of securing the public accommodation, without exposing the road to an unfair competition; that the entering road acquired as it were a leasehold interest in the servient road, and if one had the right to change the track, the other should have the same right; that under such a charter as that of the complainants, the entering road has a right to use the servient road *as located* — the *location* being all that has a legal existence as a railroad, and that any permanent interruption of the track of the servient road is an injustifiable invasion of the rights of the entering road.

Salaries of the English Judges. — May 5th, Lord John Russell brought the report of the Select Committee on official salaries under the attention of the House of Commons, explaining what recommendations of the Committee had been adopted or rejected by the Government. In regard to the Judges, he defended at length the principle of choosing for the Judges of the law courts those gentlemen who have attained the first rank in the race for legal distinction at the bar. This system raised to the bench such men as Hardwicke, Camden, Eldon, and Mansfield. But such men are not easily tempted to yield their large private revenues. The Government proposes that the salary of the Lord Chancellor shall be £10,000 a year instead of £14,000, (from two sources) as at present; that of the Chief Justice of the Queen's Bench, £8000 instead of £7000, as proposed by the Committee; and those of the Chief Justice of the Common Pleas, and the Chief Baron, £7000 instead of £6000, as proposed; those appointed after last year to be subject to this arrangement. The diminution of the salaries of the Scottish and Irish Judges, involving a large loss to the Judges with but small saving to the public, the Government does not accept.

Notices of New Books.

Reports of Cases argued and determined in the Supreme Judicial Court of Massachusetts. By Theron Metcalf. Vol. XIII. pp. 639. Boston. Charles C. Little and James Brown, 1851.

This volume, the publication of which has been unavoidably postponed, brings down the reported cases to those contained in the First of Cushing, and closes the third series of Massachusetts Reports. Without disparaging other Reports, it may safely be said that Metcalf's Reports are excelled by none, either in this country or in England. The dignity, learning, and ability of the Court whose decisions they report, would give character to any reports: yet it is the accuracy and fidelity with which decisions are reported, that give them value. Few reporters have attained a higher reputation for accuracy than Judge Metcalf. His statements of the points decided in each case, saving, perhaps, some of the marginal notes in the eighth volume, are clear, concise, and accurate, setting out with precision the whole decision, and no more and no less. His learning and discrimination, the result of a life of study, have enabled him to do well this difficult and important part of a reporter's duty. The arguments of counsel have generally been given with sufficient fullness, and what is of great importance to the consulting lawyer, the citations are given with accuracy, and he is sent on no fool's errand.

The volume before us has the characteristic merits of its predecessors, and did our limits permit, we should gladly refer to some of the decisions, and call attention to the able arguments of counsel in some of the cases. It may not, however, be amiss to state that, since the publication of the volume, a statute has been passed quieting any disturbance to titles which the decision in *Ex parte Blair* may have caused.

The proceedings of the Suffolk Bar upon the death of Judge Hubbard, with the feeling speech of Mr. Loring, and the affecting reply of Judge Shaw, are appended to the volume in a supplement. There is likewise a general Table of the Cases in the thirteen volumes of these Reports.

ENGLISH REPORTS IN LAW AND EQUITY: CONTAINING REPORTS OF CASES IN THE HOUSE OF LORDS, PRIVY COUNCIL, COURTS OF EQUITY AND COMMON LAW, AND IN THE ADMIRALTY AND ECCLESIASTICAL COURTS; INCLUDING ALSO CASES IN BANKRUPTCY, AND CROWN CASES RESERVED. Edited by EDMUND H. BENNETT and CHAUNCEY SMITH, Esqrs., Counsellors at Law. Vol. I. pp. 727. Containing Cases in the House of Lords, the Privy Council, and in all the Courts of Equity and Common Law, from and after Michaelmas Term, A. D. 1850. Also Crown Cases reserved, and Cases in the Ecclesiastical and Admiralty Courts. Boston: Charles C. Little and James Brown. 1851.

We think the profession are under obligations to the editors and publishers of this new Series of Reports, who, we hope, will receive ample remuneration for their services. To have the English Reports at any time in a cheap and readable form is well; but to have the decisions of all the English tribunals — as they come fresh from the Courts — with the colloquy between Court and counsel, taken by the reporter as it falls from their lips, in a month or two after they have been pronounced in Westminster Hall, must stimulate each lawyer to learn for himself what is at the time being the English law. The intrinsic, absolute value of the Reports to the American lawyer must of course depend upon their applicability to our law; yet a study, — an opportunity for which is offered by these Reports, — of the decisions under the later English statutes, and on matters of law unknown in this country except from English text-books and reports, will well repay the labor, and give a more copious fund of illustration, and an extended knowledge of the science of law. Another advantage is promised in this series of Reports. They will give *every case* reported in the Jurist and Law Journal, and thus many cases will be brought to us which we never meet with in the regular Reports. They will not contain *nisi prius* decisions, but only those cases which were argued and decided before the Court *in banc*, and upon mature consideration. These Reports are published in numbers, monthly or otherwise, and each two numbers, commencing with the first, is paged consecutively and forms one volume.

The volume before us, the first of the series, contains one hundred and eighty-eight cases, all of which were decided in 1850 and 1851, and many as late as February of the present year. We have examined the execution of the work and can speak highly of it. The Table of Cases has not only each case in its alphabetical order, but its subject-matter. The cases themselves are arranged according to the order of precedence of the Courts. Those decided in the House of Lords come first, then come those in the Privy Council, Chancery, Queen's Bench, &c. Notes and references to analogous American decisions are appended to some of the cases, and though in this volume not very numerous, they are neat and pertinent. The Index of Subjects is full, and has this novelty. Under each title, each abstract has

at its heading a catch-word indicating the subject-matter of the paragraph, and of course, when faithfully done, as by these editors, a glance will save the labor of wading through the paragraph. The Chancery Index is kept separate from the Common Law and Admiralty.

"THE STATUTES AT LARGE AND TREATIES OF THE UNITED STATES OF AMERICA, COMMENCING WITH THE SECOND SESSION OF THE THIRTY-FIRST CONGRESS, 1850 – 1851; CAREFULLY COLLATED WITH THE ORIGINALS AT WASHINGTON. Edited by GEORGE MINOT, Counsellor at law. Published by authority. To be continued annually. Boston: Charles C. Little and James Brown, Publishers of the Laws of the United States.

All who have occasion to use the Laws of the United States, will rejoice that this has become the official edition of the Laws The edition issued until last year under the Act of 1818, may have been well enough in its day, but latterly, to say nothing of its villanous paper and print, the true Congressional pattern, it had become of little value, as it conformed to an edition of the Laws now out of use. This official edition is beautifully printed on good paper, and the laws, treaties, &c., have been carefully collated with the originals at Washington, and can be relied on as correctly printed. This volume contains the public acts, and resolutions, and the private laws passed at the last session of Congress, and the treaties that have been proclaimed and the proclamations that have been issued since the publication of the previous volume. The public and private laws and the treaties are printed, paged and indexed separately, so that they can be bound by themselves. There has not recently been a session of Congress in which so little legislating has been done There were only thirty-one public acts passed, and of these, except the appropriation and postage bills, there were but four or five acts of general interest, — the act to prescribe the mode of obtaining evidence in cases of contested elections, — that relating to the appraisement of imports, — to the mileage of senators, — to land claims in California, and to the liability of ship-owners. We may recur to these laws more fully hereafter.

THE RAIL-ROAD LAWS AND CHARTERS OF THE UNITED STATES, NOW FOR THE FIRST TIME COLLATED, ARRANGED IN CHRONOLOGICAL ORDER, AND PUBLISHED WITH A SYNOPSIS AND EXPLANATORY REMARKS. By W. P. GREGG and BENJAMIN POND of the Boston Bar. Vol. I., pp. 954; containing the Rail-road Laws and Charters of Maine, New Hampshire and Vermont; vol. II., pp. 1192; containing the Rail-road Laws and Charters of Massachusetts, Rhode Island and Connecticut. Boston: Charles C. Little and James Brown. 1851.

As the title indicates, the object of the publication is to give the Rail-road Laws and Charters of the United States. The two volumes of the series already published contain the Rail-road Laws and Charters of the New England States. The plan of the work is this. The charters of the several roads in a particular state are arranged in chronological order, and if there have been subsequent legislative acts relative to any road, they are given with the original charter of the road, to which is prefixed a synopsis of its provisions. All the general acts of the legislature of the state relating to rail-roads and other corporations are then given, and to these also is prefixed a synopsis of their several provisions. In this manner the work furnishes materials for a history of rail-roads, and is in itself almost a complete history. The first rail-road charter granted in New England is that of the Granite Rail-way Company in Massachusetts, which bears date March 4, 1826, and authorized the construction of a rail-road from the

Granite Ledges in Quincy to tide-water. Since that time down to January 1850, charters have been granted to nearly three hundred rail-roads in New England; and all these charters, and the several acts in addition thereto, are contained in the two volumes. This statement gives an idea, not only of the amount of labor that must have been expended in the compilation of the volumes, but also of the extent of the railway power.

To owners of rail-road stocks this book is of peculiar importance, for the value of this species of property must depend in a great measure upon the rights and privileges which are granted by the different charters, and upon the laws of the different States in relation to these corporations. Rail-road stocks are becoming one of the well established modes of investment. Yet there are so many different provisions in the different New England States as to the personal liabilities of stockholders for the debts of the corporations; so many statute regulations as to the transfer of stocks; so many various and important provisions in every charter as to the rights of the corporation and its members, and as to the duties of the directors, that no stockholder can safely hold the securities of any rail-road, without an examination upon these points. Heretofore this has been practically impossible, for our most perfect law libraries even contain no collection of these important laws, and this is the first attempt to give them to the public in any form; but now the labor will be comparatively easy. To the profession this work is of additional value, as it presents to them all the laws in relation to all classes of corporations throughout New England, and those who have ever attempted the task will readily appreciate the importance of a publication which will save the necessity of a laborious research and comparison of the conflicting laws of successive legislatures in the several States.

The work appears to have been edited with great completeness and fidelity, and is highly creditable to the editors who have undertaken the laborious task. Such labors cannot well be too highly commended. To compile such books is hard, dry work; but their compilation saves each member of the profession at some time from the necessity of doing the same hard, dry work; for in this day of rail-roads, any lawyer's escape from the investigation of rail-road law, would be miraculous; and while the editors are commended, the enterprising publishers should be thanked for giving us these volumes executed in such handsome style.

Obituary Notices.

Died, in Chester, N. H., Dec. 23, 1850, Hon. Samuel Bell, aged 81. Judge Bell was born at Londonderry, New Hampshire, in February, 1770, and was a descendant of one of the families of Scotch Presbyterian emigrants from the vicinity of the city of the same name in Ireland, by whom that part of the State was settled. He was educated at Dartmouth, and, after leaving college, entered upon the profession of the law, having pursued its study under the direction of the elder Judge Samuel Dana. After presiding in both branches of the State Legislature, he was appointed a Judge of the Superior Court in 1816, and remained upon the bench of that Court till 1819. He was Governor of New Hampshire from 1819 to 1823, and Senator in Congress from 1823 to 1835.

He was endowed with strong native powers of intellect, which were improved by habits of study and reflection, and through a long life he exhibited a character at once firm, consistent, and well balanced. He discharged successfully and uprightly, the duties of the various public trusts with which he was honored. Few men, if any, leave behind them a reputation for integrity and moral worth more pure and unspotted.

April 29th, at Pietra Santa, in the Duchy of Lucca, the EARL OF COTTENHAM, late Lord Chancellor of England, aged 70.

"Mr. Charles Christopher Pepys was born in 1781, and was the second son of Sir William Weller Pepys, by the eldest daughter of the Right Hon. William Dowdeswell. He graduated at Trinity College, Cambridge, as LL. B., in 1803, and was called to the bar, at Lincoln's Inn, the following year. Thenceforth his career was steady and prosperous. In 1821, he married the daughter of William Wingfield, Esq., and niece of the second Earl of Digby, by whom he had six sons and six daughters. In 1826, he was appointed King's Counsel, was made Solicitor-General to Queen Adelaide in 1830, and Solicitor-General to the King in 1834, when he was knighted, and in the same year was raised to the dignity of the Master of the Rolls. The Great Seal being put into commission in 1835, he was appointed first commissioner, and in the following year became Lord Chancellor, and was created a baron. He remained on the woolsack until 1841, and returned to it in August, 1846. On his retirement from the Chancellorship, last year, he was created an earl. Lord Cottenham's politics were always those of the whig school. He sat in the House of Commons, for the borough of Malton, from 1832 to 1836, having previously sat for Higham Ferrars; but his share in political action was of a limited description." In the words of a journal of adverse politics, "he was a consistent whig, and a sound, impartial judge."

April 18. At Tunbridge Wells, HENRY, LORD LANGDALE, late Master of the Rolls, aged 67.

The death of Lord Langdale, scarcely a month after his retirement from active duty in the Court of Chancery, is an unexpected event. It was understood in the profession that the laborious requirements of his judicial position were becoming too oppressive for his strength, and that he had resolved last autumn to retire this spring from the Rolls Court, where the whole of his professional career had been run: but when he bade adieu to the bar of that court, the farewell words of reverence which were addressed to him by Mr. Turner, the leader, were spoken in as much hope for the future of Lord Langdale, as regret at the loss to the public. It was believed that rest, and the enjoyment of that classic retirement which was his chief delight, would restore his health, and enable him to use his powers and experience with fuller effect in furthering the cause of law reform as a legislator. But the over-exertion of his prolonged attendance in court had produced a degree of exhaustion from which he was unable to rally. His faculties, which had remained unimpaired to the last moment of his judicial duty, collapsed under that repose which came too late. "The silver cord was already loosened, and the bowl was broken at the fountain:" paralysis came on; and he died on Good-Friday, at Tunbridge Wells, whither he had repaired for change of air and scene.

Henry Bickersteth, Lord Langdale, was born on the 18th of June, 1783, at Kirby Lonsdale, in Westmoreland. The *Times* states that his father "belonged to the class of the small landed gentry of the North of England"— meaning, we suppose, the ancient and sturdy class of "statesmen," which is a distinctive and admired social feature in the Lake counties; but the *Morning Chronicle* asserts, with seeming particular knowledge, that Lord Langdale's father was "a medical practitioner of local celebrity." The deceased also was educated for the medical profession; but the advice of friends diverted him to the law. He had entered at Caius College, Cambridge, and been Senior Wrangler in 1808. He was called to the bar, by the Society of the Inner Temple, in 1811; and rose gradually into such practice in the Court of the Master of the Rolls, that he divided the lead of that Court with Mr. Pemberton Leigh.

When the Whigs broke with Lord Brougham, and Sir Christopher Pepys was made Lord Chancellor as Lord Cottenham, Mr. Bickersteth was made Master of the Rolls, with a seat in the House of Peers as Lord Langdale,— in some hope that he would wield Lord Brougham's gigantic mace of Law Reform with much of the power and hearty will that first gave it so sudden and promising an impetus: for Mr. Bickersteth had far more in his favor than the great forensic eminence which he enjoyed. "Throughout the whole course of his life," says the biographer in the *Times*, who writes with a fine sense of the personal character, and an intimate knowledge of the life of the deceased, "Lord Langdale was ardently devoted to the cause of liberal opinions; and although he figured but little at any time in the arena of party politics, no man pursued with greater enthusiasm the work of reform, or brought a more subtle intellect to bear upon the great problems of social and legal improvement. His speculative opinions upon these topics brought him into close and habitual contact with that remarkable set of men who, about a quarter of a century ago, looked up to Mr. Bentham as their sage and lawgiver; and although the philosopher of Queen Square, Westminster, was hardly

destined to witness the practical application of Sybilline labors, no small portion of the reforms we have since accomplished in our laws, our administration, and the constitution itself, may be traced to that class of thinkers who claimed to be his disciples, and amongst whom Lord Langdale occupied a distinguished place." But though the hopes failed which anticipated an equal to Lord Brougham in his successor — because, indeed, they were hopes extravagantly pitched — Lord Langdale's name will be associated with substantial improvements both in the letter and the administration of the law. The present law of wills owes its simplicity, compared with the congeries of feudal complexities which the law of wills formed before 1838, to his improving hand; the regulations which have simplified and cheapened the practice of the Equity Courts within the last two years were much due to his liberal endeavors; and the improvements effected in the custody of the national records received from him almost the sole assistance of a powerful official character which they have ever obtained. Perhaps also we might quote, as not one of the least titles to respect in the character of a Chancery reformer, this point from the *Times* — "No man ever sat in the Court who was more anxious to reform its abuses, and the last disappointment of his life was the production by Lord John Russell of the miserable Chancery bill of the present session." As a judge, Lord Langdale was distinguished less by intuitive felicity, than by a subtile and exhaustive analytic power, which rarely left his ultimate conclusions impeachable. As the arbiter morum in his Court, he was remarkable for the delicate punctilio, and the high severity of moral principle, which he enforced and instilled among his assistant bar.

Upon the resignation of Lord Cottenham, last year, the Great Seal was oftener than once tendered to Lord Langdale by Lord John Russell: but he refused to tax so much further his already over-stretched powers.

The deceased married late in life the Lady Jane Harley, eldest daughter of the late Lord Oxford; by whom he leaves one daughter: his peerage has become extinct.

In New Haven, Conn., April 12, 1851, Hon. DAVID DAGGETT, aged 86.

Judge Daggett was the son of Thomas Daggett, and was born in Attleborough, Mass., Dec. 31, 1764. Early devoted to a life of study, he entered the Junior Class at Yale College at the age of sixteen, and graduated with distinction in 1783, in the same class with Samuel Austin, Abiel Holmes, and John Cotton Smith. Soon after leaving college he commenced the study of Law in the office of Charles Chauncey of New Haven, afterwards Judge of the Superior Court, and in January, 1786, was admitted to the bar of New Haven County, and immediately entered upon the practice of his profession in New Haven. While a student under Judge Chauncey, he supported himself by performing the duties of butler in college, and of preceptor in the Hopkins Grammar School. A few months after his admission to the Bar he was appointed Tutor in Yale College, but, through love of the profession of his choice, he declined the office, and devoted himself to his professional studies.

Mr. Daggett was early called into political service. In 1791, he represented New Haven in the General Assembly, and was reëlected annually for six years. Though one of the youngest members he soon became one of the most influential, and in 1794 was elected speaker. This office he held by an annual reëlection until he was chosen a member of the Council or Upper House. At that time this body was thus constituted. At the autumn election twenty persons were chosen at large from among the ablest men in the State, and from these twenty, the twelve who had the highest number of votes at the spring election, constituted the Senate. To this body, Mr. Daggett was transferred from the chair of the House of Representatives, in 1797, and retained his seat for seven years, until his resignation in 1804. In 1805, he was again a member of the House of Representatives, and in 1809 was reëlected a member of the Upper House of the General Assembly; which place he held in that body, till May, 1813, when he was chosen a Senator in the Congress of the United States, for six years from the preceding fourth of March. In June, 1811, he was appointed State's Attorney for the county of New Haven, and continued in that office till he resigned it, when chosen senator in 1813. At the close of his senatorial term, in 1819, he returned to his extensive practice of law, which conduced much more to his private interest than had the public service of the State, in which he had been engaged as her representative in the Senate of the United States. In November, 1824, he became an associate instructor of the Law School in New Haven with the late Judge Hitchcock; and in 1826, was appointed Kent Professor of Law in Yale College. In these positions he continued, until at a very advanced age his infirmities induced him to resign them. In May, 1826, when he was sixty-two years of age, he was chosen an Associate Judge of

the Superior Court of his State, and in the autumn of that year, received from Yale the honorary degree of LL.D. During the years 1828 and 1829 he was mayor of the city of New Haven. In May, 1832, he was made chief justice of the Supreme Court. Here, as when he was made an associate judge, again, singular testimony was offered to his preëminent judicial qualifications; for, contrary to the usual custom, he was appointed by the Legislature to that chief place although not the senior in office among the judges on the bench. Judge Daggett continued to perform the duties of that station until December 31st, 1834; when he reached seventy years of age — the limit which the State Constitution of Connecticut assigns to the judicial office. Thus from the beginning of his twenty-sixth to the close of his seventieth year, was Mr. Daggett almost continually engaged in public service.

Mr. Daggett was admitted to the bar, and entered into public life, two years before the adoption of the Federal Constitution. Of the political parties which grew out of the adoption of that Constitution, he united, as did the great body of the people of New England at that day, with the Federal party. Of this party, though not a mere partisan, but a true statesman, he was a firm, consistent, and thorough supporter. In the Legislature of the State, and as a senator of the United States, he was a sagacious and powerful advocate of its general principles and policy. And among its many strong men in his State, it had none stronger than he. And after its defeat and prostration and the formation of new parties upon new issues, he was not ashamed, or reluctant, to have it known, that he belonged to the same school of politics with Washington and Hamilton, Jay and Pickering, Adams and Ames, Ellsworth and Sherman.

The features of Judge Daggett's intellectual character — his quick and thorough insight, his well-balanced judgment and strong common sense, his quick and ready perception of fitness, his wit and humor, his power of varied and felicitous illustration, his ready memory, his energy of feeling, his concentration, his clear and nervous language, his practical knowledge of law, these, joined to his qualities of person and manner — his tall and commanding form, always dressed carefully, richly, and in good taste, rising and dilating as he warmed with his subject, his large and piercing eye, his expressive brow, his strong-featured Roman face, and his powerful voice — these qualities of mind, person and manner, made him an advocate, who, in his best days, had on the whole, no superior, if he had an equal, at the bar of Connecticut.

Judge Daggett manifested particular kindness to those who were beginning life, especially in his own profession; sympathizing with them in their difficulties and anxieties, because he remembered his own. He had a just idea of the nature, and a thorough appreciation of the rules of civility and courtesy at the bar; and observed them scrupulously in his own conduct. He was fair in his treatment of witnesses; regarding their feelings; never harsh and overbearing toward them, unless indeed they deserved severity, when he knew well how to use it; never resorting to the unscrupulous method of making an honest opposing witness appear ridiculous, or confused and perplexed, in order to impair the just force of his testimony.

He was, in a high degree, polished in his manners, gracefully and scrupulously observant of all civilities. His courtesy was remarkable. He was disposed, and his almost instinctive sense of propriety and his grace and ease of manner and language enabled him to please all whom he met: and this made him a model of courtesy. In the performance of social civilities and duties, to relatives, neighbors, and friends, he was an example, such as is rarely if ever found in these days. His courtesy, his varied knowledge of men and things, his lively feelings accommodated readily to the old and the young, his cheerfulness, his wit and humor, his fund of anecdote, and his reminiscences of the past, made him the life of every social circle into which he entered.

At the age of twenty-one, and soon after he commenced the practice of law, Judge Daggett married a daughter of Dr. Æneas Munson, of New Haven, with whom he lived, in confiding attachment and regard till her death in July, 1839, at the age of seventy-two. His home, although filled with comforts and joys, was darkened by the sorrows of many bereavements. He had nineteen children by his first marriage, and of the fourteen who lived any considerable time only three survive him. The death of a son, at the early age of eighteen, who bore his father's name, and who was of unusual loveliness and promise, deeply affected him. This was a sorrow from which he never entirely recovered; though the blow fell upon his heart forty-one years since. It is not long ago that he said to a friend: "There has not been a day in all these years, in which I have not thought of that beloved son."

In May, 1840, Judge Daggett was married, a second time, to Mary, daughter of Major Lines, who survives him.

The immediate cause of Judge Daggett's death was a cold which came upon him about ten days before his decease. It settled upon his lungs, and his strength was too much enfeebled to throw it off. It can hardly be said that he had disease upon him. Age had exhausted his vital power.

List of New American Law Books.

TREATISES.

International Law. — Institutes of International Law, by Richard Wildman, Esq., of the Inner Temple, Barrister-at-law, &c. Vol. ii. International Rights in time of war. In Law Library, Oct., Nov., Dec., 1850. Philadelphia: T. & J. W. Johnson. 1850.

Maxims. — "A selection of Legal Maxims, classified and illustrated, by Herbert Broom, Esq, of the Inner Temple, Barrister-at-Law. Second edition. Philadelphia: T. & J. W. Johnson. 1850.

Mortgage. — A Treatise on the Law of Mortgage, by Richard Holmes Coote, Esq., of Lincoln's Inn, Barrister-at-Law. The third English edition by the author, and by Richard Coote, Esq. Second American edition with notes and references to American cases. (In Law Library, for July, Aug., Sept., 1850.) Philadelphia: T. & J. W. Johnson. 1850.

Medical Jurisprudence.—Elements of Medical Jurisprudence, by Theodoric Romeyn, and John B. Beck. Tenth edition. Two vols. 8vo. Little & Co., Albany: 1851.

REPORTS.

American Leading Cases. — Being select decisions of American courts in several departments of law, with especial reference to Mercantile Law, with notes by J. I. Clark Hare and H. B. Wallace. Second edition, with additional cases and notes. Two vols. 8vo. Philadelphia: T. & J. W. Johnson. 1851.

Comstock's Reports of the New York Court of Appeals. Vol. iii. Albany: Little & Co. 1851.

English Common Law Reports. — Reports of Cases argued and determined in the English Courts of Common Law, with tables of the cases and principal matters. Vol. lxi., containing cases at Nisi Prius, in the Queen's Bench, Common Pleas, Exchequer, on the Circuits, and Central Criminal Court, and Crown Cases Reserved, from Michælmas Term, 9 Vict., to Hilary Term, 13 Vict.; by F. A. Carrington and A. V. Kirwan. T. & J. W. Johnson: Philadelphia. 1850.

Exchequer Reports. — Reports of Cases argued and determined in the Courts of Exchequer, and Exchequer Chamber. Vol. iii. Michælmas Term, 12 Vict. to Easter Vacation, 12 Vict., both inclusive; by W. N. Welsby, of the Middle Temple, E. J. Hurlestone, of the Inner Temple, and J. Gordon, of the Middle Temple, Esqs., Barristers-at-Law; with references to decisions in the American Courts, by J. I. Clark Hare and H. B. Wallace. Philadelphia: T. & J. W. Johnson. 1851.

Pennsylvania State Reports. — Containing Cases adjudged in the Supreme Court during part of May Term, July Term, and part of September Term, 1849. Vol. xi. By J. Pringle Jones, President of the Third Judicial District. Philadelphia: T. & J. W. Johnson. 1850.

Peters's Reports. — Reports of Cases argued and adjudged in the Supreme Court of the United States; by Richard Peters, Jr., Counsellor-at-Law, and Reporter of the Decisions of the Supreme Court of the United States. In 16 vols. 8vo. New edition. Philadelphia: Thomas, Cowperthwaite & Co. 1851.

Peters's Condensed Reports. — Condensed Reports of Cases in the Supreme Court of the United States; containing the whole series of the decisions of the Court, from its organization to the commencement of Peters's Reports, at January Term, 1827; with copious notes of parallel cases in the Supreme and Circuit Courts of the United States. Edited by Richard Peters, Counsellor-at-Law, and Reporter of the decisions of the Supreme Court of the United States. In 6 vols. 8vo. New edition. Philadelphia: Thomas, Cowperthwaite & Co. 1851.

Select Cases in Equity. — Argued and determined in the Court of Common Pleas, of the First Judicial District of Pennsylvania, from 1841 to 1850. Reported by

A. V. Parsons, one of the judges of the Court. Vol. i. Philadelphia: T. & J. W. Johnson. 1851

A Selection of Leading Cases in Equity, with Notes by Frederick Thomas White and Owen Davis Tudor, of the Middle Temple, Esqs., Barristers-at-Law; with additional annotations, containing references to American Cases, by John Innis Clark Hare and Horace Binney Wallace. Vols. ii., iii. In Law Library, for January to June, inclusive, 1851. Philadelphia: T. & J. W. Johnson. 1851.

DIGESTS.

A Digest of the Laws of Texas; to which is subjoined an Appendix, containing the Acts of Congress of the United States, on the subjects of the Naturalization of Aliens, and the authenticitation of records, &c., in each State or Territory, so as to take effect in every other State or Territory; and to which are prefixed the Constitutions of the United States, of the provisional government of Texas, of the Republic of Texas, and of the State of Texas. By Oliver C. Hartley, of Galveston. Philadelphia: Thomas, Cowperthwaite & Co. 1850.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Baker, William P.	Boston,	April 23,	John M. Williams.
Barrow, Leander S.	Plymouth,	" 11,	Welcome Young.
Binney, Omer	Brookline,	" 18,	John M. Williams.
Blanchard, Henry	Brookline,	" 18,	John M. Williams.
Bullard, George C.	Holliston,	" 4,	Asa F. Lawrence.
Bullock, Silas J.	Milford,	" 24,	Henry Chapin.
Carpenter, Benjamin	Seekonk,	" 17,	David Perkins.
Chase, Clement	Clinton,	" 5,	Henry Chapin.
Childs, James M.	Framingham,	" 3,	Asa F. Lawrence.
Corning, Gilman	Haverhill,	" 17,	John G. King.
Crosby, Abner U.	Barnstable,	" 1,	Zeno Scudder.
Cummings, Alonzo	Adams,	" 4,	Thomas Robinson.
Davis, John 2d	Haverhill,	" 17,	John G. King.
Earl & Thayer	South Hadley,	March 22,	Myron Lawrence.
Edwards, B.	Salem,	April 11,	John G. King.
Ellis, Charles S.	Braintree,	" 3,	Henry Chapin.
Emery, Lyman F.	Foxboro',	" 14,	Francis Hilliard.
Evans, Brice S.	Malden,	" 18,	Asa F. Lawrence.
French, Elias S.	Lowell,	" 16,	Asa F. Lawrence.
Gleason, Lewis	West Brookfield,	" 14,	Henry Chapin.
Harris, N. B. Jr.	Gloucester,	" 22,	John G. King.
Hill, Emerson S.	Shutesbury,	" 2,	D. W. Alvord.
Hood, Samuel	Georgetown,	" 12,	John G. King.
Holmes, Leander	Plymouth,	" 11,	Welcome Young.
Knight, Bragton	Lowell,	" 1,	Asa F. Lawrence.
Kelley, Frank H.	Lawrence,	" 8,	John G. King.
Lafrange, John A.	Sheffield,	" 11,	Thomas Robinson.
Laffin, Wills	Great Barrington,	" 18,	Thomas Robinson.
Lawrence, Isaac	Lowell,	" 28,	Asa F. Lawrence.
Leavitt, Jonathan	Quincy,	" 7,	Francis Hilliard.
Leland, Leander	Winchendon,	" 21,	Henry Chapin.
Moore, Henry A.	Boston,	" 24,	John M. Williams.
Nelson, William	Georgetown,	" 12,	John G. King.
Owen, John B.	Sandisfield,	May 5,	Thomas Robinson.
O'Donnell, Dennis	Roxbury,	April 5,	Francis Hilliard.
Page, Simon B.	Lowell,	" 1,	Asa F. Lawrence.
Putnam, John P.	Somerville,	" 4,	John M. Williams.
Richardson, W. B.	Boston,	" 28,	John M. Williams.
Sabins, Resolved	Millbury	" 11,	Henry Chapin.
Skeele, Edwin A.	Waltham,	" 23,	Asa F. Lawrence.
Smith, Oliver H.	Holliston,	" 4,	Asa F. Lawrence.
Stebbins, Ebenezer	Deerfield,	" 15,	D. W. Alvord.
Simmons, Geo. W.	Boston,	" 28,	John M. Williams.
Thayer, Porter	Springfield,	" 12,	George B. Morris.
Thompson, Olney F.	Worcester,	" 15,	Henry Chapin.
Vinton, Josiah O.	East Bridgewater,	" 29,	Welcome Young.
Wadleigh, Geo. A.	Boston,	" 4,	John M. Williams.
Whitman, Wm.	Montgomery,	" 3,	George B. Morris
Wilder, Harrison	Randolph,	" 29,	Francis Hilliard.
Yance, Horace W.	Chicopee,	" 3,	George B. Morris.